Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

S.D. MYERS, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding, in conflict with the First Circuit, that refusing to contract with a company because the company's lawful conduct in other jurisdictions does not conform to the government's social policy (here, domestic partner benefits) is not an economic sanction prohibited by *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (Due Process violation)?

2. Did the Ninth Circuit err in holding, in conflict with the First Circuit and this Court, that the government's use of its contract power to regulate, in other jurisdictions, lawful conduct that is unrelated to the contract does not violate the Interstate Commerce Clause?

3. Did the Ninth Circuit err in holding, in conflict with a decision of this Court, that a city or state has an interest in protecting nonresidents that outweighs the burden on interstate commerce of regulating commerce (i.e., employee benefits) in other states?

4. In the alternative, should this Court grant certiorari, vacate the Ninth Circuit's opinion, and remand for consideration of facts relating to new conflicting laws and the actual extraterritorial effects of the ordinance that were not before the court at the time of its opinion?

CORPORATE DISCLOSURE STATEMENT

S. D. Meyers, Inc. is a privately held corporation that has no parent corporation. No publicly held company owns 10% or more of the stock in S. D. Myers, Inc.

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PETITION FOR A WRIT OF CERTIORARI

S.D. Myers respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that ruled, in conflict with decisions of this Court and the First Circuit, that the City of San Francisco may regulate social policy across the nation through its contract power.

In view of the conflicting authority about the legitimacy of imposing social policies through government contracts, the recent proliferation of city policies requiring contractors to provide domestic partner benefits, and the important question of whether cities may validly export their social policies outside their borders, the Court should grant the petition for certiorari.

OPINIONS BELOW

The district court's original unpublished summary judgment in this case dated May 27, 1999, is reprinted at Appendix ("App.") 23a. The opinion of the United States Court of Appeals for the Ninth Circuit that is at issue here is reported at 253 F.3d 461 (2001), and is reprinted at App. 1a. The district court's unpublished opinion on remand dated June 24, 2002, is reprinted at App. 49a. The Ninth Circuit's opinion affirming the second dismissal is reported at 336 F.3d 1174 (2003), and is reprinted at App. 56a. The unpublished denial of rehearing *en banc*, dated September 26, 2003, is reprinted at App. 66a.

JURISDICTION

The Ninth Circuit opinion at bar remanded the case for further proceedings that are not at issue on this appeal. The Ninth Circuit issued its second opinion on July 29, 2003, and denied a timely petition for rehearing and rehearing *en banc* on September 26, 2003. This petition has been filed within 90

days of the denial of the petition for rehearing or rehearing *en banc*, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS/ORDINANCES INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ." The Interstate Commerce Clause, Article 1, section 8 of the United States Constitution, authorizes the federal Congress "To regulate Commerce . . . among the several States . . . ." San Francisco City Administrative Code Chapter 12B[1] requires all city contractors to offer employee benefits to registered domestic partners of unmarried employees—opposite-sex or same-sex—on the same basis as to the spouses of married employees. Chapter 12B is set forth at App. 68a.

STATEMENT OF THE CASE

The intent and practical effect of San Francisco City Administrative Code Chapter 12B (the "ordinance") is to regulate the employee benefits of thousands of employers throughout the United States. The ordinance currently regulates employee benefits for 1,722,000 employees in 39 states and nearly 500 cities. Over three quarters of U.S. employers that offer domestic partner benefits do so to comply with the ordinance.

A. Statement of Facts

S.D. Myers, an Ohio based corporation, performed maintenance on electrical transformers for the City pursuant to two contracts between 1995 and 1997. Summary Judgment at 5, App. 27a. In September 1997 S.D. Myers submitted another

[1]Available at www.sfgov.org/site/sfhumanrights_page.asp?id=5922.

bid to maintain City-owned electrical transformers located on property controlled by the City, but outside City limits. *Id.* Although S.D. Myers was the lowest bidder, the City rejected the bid solely because S.D. Myers refused to agree to provide domestic partner benefits under the recently enacted ordinance. *Id.* If S.D. Myers had been awarded the contract, it would have used *Ohio-based employees* to perform it. Dana S. Myers Aff., ¶ 10, App. 97a.

San Francisco had enacted the ordinance earlier in 1997, purportedly to prohibit discrimination based on sexual orientation. *S.D. Myers v. City and County of San Francisco*, 253 F.3d 461, 465 (2001). As written, the ordinance expressly applied to all U.S. operations of employers that contract with the City. § 12B.1(d), App. 72a.[2] In another proceeding, the district court invalidated the portion of the ordinance that explicitly applied to all U.S. operations of contractors. *See Air Transport Ass'n v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998). Even so, the practical effect of the remainder of the ordinance is that it applies to all operations of City contractors, wherever they have employees.

B. Proceedings Below

S.D. Myers filed this action against the City and County of San Francisco and the San Francisco Human Rights Commission (collectively, "City") in the United States District Court for the Northern District of California in December of 1997. The suit challenged the ordinance under the Due Process Clause, the Interstate Commerce Clause, ERISA preemption and several state-law grounds. *Id.* at 1. The trial judge granted summary judgment on behalf of the City on May 27, 1999. *Id.*

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[2]The definition of "contract" excludes "contracts for a cumulative amount of $5,000 or less per vendor in each fiscal year." § 12B.1(c), App. 70a.

On appeal the Ninth Circuit rejected S.D. Myers' claim that the ordinance has extraterritorial effects in violation of the Due Process Clause. The court held that declining to contract with an entity on the ground of the entity's refusal to comply with a social policy is not an economic sanction. *S.D. Myers*, 253 F.3d at 472. The Ninth Circuit also rejected S.D. Myers' argument that the ordinance has a direct impact on interstate commerce. It held that the ordinance did not have a direct impact on interstate commerce in the absence of evidence of "actual and imminent" conflicting legislation. *Id.* at 469-70. The court further held that the City may use its contract power to regulate employer policies unrelated to the contract, even for employees working outside its borders, and that the local benefit of the ordinance outweighs the burden on interstate commerce. *Id.* at 469, 471-72.

Although the Ninth Circuit affirmed all of the rulings of the trial court, it remanded the question of whether the ordinance was in conflict with a new California domestic partnership law. *S.D. Myers*, 253 F.3d at 473. On remand the trial court again ruled for the City, and the Ninth Circuit affirmed on appeal. *S.D. Myers v. City and County of San Francisco*, 336 F.3d 1174 (2003) (*S.D. Myers II*). The court denied a motion for rehearing or rehearing *en banc* on September 26, 2003. App. 66a.

C. Subsequent Events

In the courts below S.D. Myers argued that because of its extraterritorial effect, the ordinance would inevitably conflict with other laws, which would subject S.D. Myers and other contractors to inconsistent rights and obligations.[3] That

[3]Under this Court's Commerce Clause cases, different states' regulations may be inconsistent even though it is possible to comply with all of them. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (citing cases where it was possible to comply with inconsistent regulations).

potential became real when, subsequent to the briefing on the appeal at issue, Nebraska voters adopted a voter-initiated constitutional amendment that conflicts with the ordinance. Article I, § 29 of the Nebraska Constitution provides that "[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." App. 171a. Accordingly, employers in Nebraska have a state constitutional right not to be required to provide same-sex domestic partner benefits.[4] Further, the Michigan legislature is currently considering a resolution that would submit a similar constitutional amendment to Michigan voters. The proposed Michigan amendment provides that no relationship other than marriage between a man and a woman "shall be recognized as a marriage or its legal equivalent . . . ." Michigan Senate Joint Resolution E (2003), App. 172a.[5] This provision, if adopted, would give Michigan employers a state constitutional right not to be required to treat domestic partnerships as the equivalent of marriage. The Ninth Circuit did not consider either of these measures in rendering its decision.

Furthermore, subsequent to the Ninth Circuit's decision, Defendant/Respondent San Francisco Human Rights Commission ("SFHRC") *reported the actual impact of the ordinance* on its website as "Statistical Reports." The Statistical Reports currently available on the SFHRC website are:

Equal Benefits Five-Year Report
Equal Benefits Four-Year Report - Oct. 25, 2001
Equal Benefits Three-Year Report - Aug. 10, 2000

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[4]The Due Process Clause prohibits a state from requiring a business to waive a constitutional right in order to do business in a state. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (state could not make waiver of constitutional right to resort to federal court condition of doing business).

[5]Available at www.michiganlegislature.org/documents/2003-2004/jointresolutionintroduced/senate/pdf/2003-SIJR-E.pdf.

Equal Benefits Two-Year Report - Aug. 12, 1999
Equal Benefits Six-Month Report - Jan. 06, 1998.[6]

(Hereinafter, Five-Year Report, Four-Year Report, etc.) These Statistical Reports reveal that even after the 1998 *Air Transport Association* decision invalidated the portion of the ordinance that explicitly applied to all of a contractor's U.S. operations, the practical effect of the ordinance is to regulate extraterritorial conduct. From the first Statistical Report to the last, SFHRC boasts about the interstate impact of the ordinance. The Five-Year Report describes the impact as follows:

> On June 1, 1997, the City and County of San Francisco set in motion a revolution. . . .
>
> Despite the fact that the concept of offering domestic partner benefits to employees was already over a dozen years old at the time the Equal Benefits Ordinance was enacted, only 500 employers in the U.S. offered such benefits. Today, *over 4,500 employers extend these benefits*. The San Francisco Equal Benefits Ordinance has been credited with playing a major role in this explosion of domestic partner benefits *with over 75% of the companies offering domestic partner benefits doing so in compliance with the City's contracting requirements*. . . .
>
> The number of employees working for City contractors that have utilized medical benefits for their domestic partners has surpassed 50,000 and can be found in at least *39 states and 500 cities* across the country. Even when, a year after the law went into effect, a court decision gave companies the option to limit where they extended nondiscriminatory benefits,

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[6]Available at www.sfgov.org/site/sfhumanrights_page.asp?id=5902#statistics.

> just over one percent of the complying companies chose to do so.

SFHRC Five-Year Report at 1, App. 103-04a (emphasis added; footnote omitted). The Three-Year Report likewise touts the nationwide impact of the ordinance:

> *The employee benefits landscape has been forever changed as a result of the Equal Benefits Ordinance.* . . . In the thirty-seven months since the law went into effect, *a new insurance market has been created to which nearly 150 insurers from across the country have responded. . . .*
>
> * * * *
>
> With equal benefits ordinances coming into effect in other cities, the positive *impact created by San Francisco's model is rapidly expanding.* This expansion is likely to *increase pressure on companies* still resistant to compliance.

SFHRC Three-Year Report at 11, App. 161-62a (emphasis added).[7]

Each of the other SFHRC Statistical Reports likewise describes the ordinance's significant impact on interstate commerce. Because these reports were neither produced during discovery nor available on the SFHRC website during discovery, the Ninth Circuit did not have the opportunity to consider this overwhelming evidence of the extraterritorial impact of the ordinance.

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[7]According to SFHRC, other cities or counties with policies requiring that contractors provide domestic partner benefits include Berkeley, Los Angeles, Oakland and San Mateo County California, Seattle and Tumwater Washington, Portland, Maine and Broward County, Florida. Five-Year Report at 10 and n. 20, App. 119a, 130a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT REFUSING TO DO BUSINESS WITH A COMPANY IS NOT AN ECONOMIC SANCTION, THUS CREATING A CONFLICT WITH THE FIRST CIRCUIT.

In *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996), this Court held:

> it is clear that no single State could . . . impose its own policy choice on neighboring States. Similarly, one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.

(Citing *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881), *Gibbons v. Ogden*, 9 Wheat 1, 194-196 (1824), *Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989), and *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).) The Court went on to hold as follows:

> We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States.

Id. at 572.

The Ninth Circuit rejected S.D. Myers' claim that barring it from the San Francisco market for failing to comply with San Francisco's social policy was an economic sanction. *S.D. Myers*, 253 F.3d at 472. The court held that because breach of contract penalties apply only if a contractor breaches an agreement to comply with the ordinance, and a contractor "will be denied the ability to contract with the City only after it has

chosen not to meet the City's requirements," there was no economic sanction within the meaning of this Court's ruling in *BMW*. *Id.*[8]

The First Circuit came to the opposite conclusion about the meaning of *BMW* in evaluating a Massachusetts statute with similar extraterritorial effects and purposes. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1999), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).[9] In the statute at issue in *Natsios*, Massachusetts expressed its disapproval of the Burmese government's violations of human rights by prohibiting state contracts with entities on a "black" list of companies doing business with Burma, except in limited circumstances. *Id.* at 46-47. The purpose of the law was to "'apply indirect economic pressure against the Burma regime for reform.'" *Id.* at 47 (quoting Massachusetts' argument). The First Circuit viewed the law as an economic sanction that was "attempting to regulate conduct beyond [Massachusetts'] borders . . . ." *See id.* at 69. In finding improper extraterritorial regulation, the court quoted *BMW*'s holding "'that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States.'" *Id.* (quoting *BMW*, 517 U.S. at 572).[10]

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[8]The Ninth Circuit held that under a facial challenge, the ordinance would not violate the Due Process Clause even if it constituted an economic sanction. *S.D. Myers*, 253 F.3d at 472. However, S.D. Myers challenged the ordinance on both facial and as-applied grounds. Opening Appellate Br. at 42-44 (as-applied); Summary Judgment at 21-22, App. 40-41a (holding that the effects as applied to S.D. Myers in Ohio did not violate Due Process or the dormant Commerce Clause).

[9]This Court affirmed on the basis of federal preemption, and did not address the other grounds for the First Circuit's decision. *Crosby*, 530 U.S. at 374 n.8.

[10]The court in *Natsios* quoted *BMW* in the context of its discussion of the dormant Commerce Clause, as it relates to interpretation of the Foreign Commerce Clause. But the *BMW* holding about economic sanctions clearly involved a due process issue.

The First Circuit went on to condemn the Burma statute "because both the intention and effect of the statute is to change conduct beyond Massachusetts's borders." *Natsios*, 181 F.3d at 69. Likewise, both the intention and effect of the San Francisco ordinance is to change conduct beyond its borders. *See* Five-Year Report at 12-13, App. 123a ("it is still City policy to encourage contractors to comply throughout the U.S."); *id.* at 1, App. 104a (City contractors providing domestic partner benefits "in at least 39 states and 500 cities across the country"); Four-Year Report at 7, App. 142a ("The impact of the San Francisco Equal Benefits Ordinance is being felt across the United States . . . . As Equal Benefits Ordinances are enacted in other cities, the positive impact created by San Francisco's model will continue to expand. . . . [T]he cost of discriminating will continue to mount").[11]

Like the First Circuit, the Ninth Circuit should have recognized that refusing to contract with businesses like S.D. Myers is an improper economic sanction.

II. THE NINTH CIRCUIT HELD THAT SAN FRANCISCO MAY USE ITS CONTRACT POWER TO IMPOSE ITS SOCIAL POLICY BEYOND ITS BORDERS.

A. The Ninth Circuit's Decision Is in Conflict with Decisions of the First Circuit and This Court

The Ninth Circuit held that the San Francisco ordinance does not directly regulate interstate commerce because it imposes its social policy "through contract rather than by legislative fiat." *S.D. Myers*, 253 F.3d at 469; *see also id.* at 472 ("narrowly construed the Ordinance only applies in the City, on City-owned property, or as to employees working on a City contract"). Justifying the imposition of social policies

[11]The Court may take judicial notice of the SFHRC Statistical Reports because they are official documents, published by the Defendants/ Respondents, addressing the interstate impact of the ordinance.

through contract power is in conflict with the First Circuit and flies in the face of this Court's precedent.

In *Natsios*, Massachusetts (like the City below) argued that any company that did not wish to comply with its social goals "can simply forgo contracts with Massachusetts, or simply beat the next highest bidder's price by ten percent." *Natsios*, 181 F.3d at 70. The First Circuit rejected that claim:

> Every discriminatory state law can be avoided by withdrawing from the enacting state. In *Healy*, for example, liquor distributors could have avoided the New York law by staying out of the New York liquor market. To allow state laws to stand on this ground, however, would be to read the Commerce Clause out of the Constitution. Moreover, the relative influence of a state's purchasing power cannot suffice to save discriminatory legislation.

Id. The state's contract power did not justify exporting its social policy outside its jurisdiction.

Moreover, this Court's precedent repudiates the Ninth Circuit's ruling that a city's contracting power is sufficient to regulate commerce beyond the subject matter of the contract and beyond its jurisdiction. In *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984), the plurality rejected the argument that the power to contract permits extraterritorial regulation. They observed that the market-participant doctrine:

> does not necessarily mean that the Commerce Clause has no application within the boundary of formal privity. The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant." Contrary to the State's contention, *the doctrine is not carte blanche to impose any conditions that the State has the*

> *economic power to dictate*, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.
>
> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. *The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.*

Id. (quoting *White v. Massachusetts Council of Constr. Workers, Inc.*, 460 U.S. 204, 211 n. 7 (1983); record citation omitted; emphasis added).

The statute in *Wunnicke* required that timber harvested from state land must be at least partially processed within the state prior to export. The state enforced the statute by including the processing requirement in contracts for sale of the timber. *Id.* at 84. Alaska sold timber at a significantly reduced rate when its contracts required in-state processing. *Id.* at 85. But the Court invalidated the statute because it regulated commerce other than the sale of timber, i.e., it regulated the market for timber processing as well.[12]

The San Francisco ordinance has a far greater impact on interstate commerce than the timber statute in *Wunnicke*. Whether S.D. Myers offers domestic partner benefits to nonresidents of San Francisco (including its Ohio employees) has no relevance whatsoever to the market of electrical

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[12]Under the circumstances, the statute could have been construed to require "paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber." *Wunnicke*, 467 U.S. at 103 (Rehnquist, J., dissenting). Regardless, the statute did not purport to regulate conduct totally unrelated to the contract, as does the San Francisco ordinance.

transformer maintenance. Further, unlike the statute in *Wunnicke*, the San Francisco ordinance was designed to regulate not a specific industry, but all commerce of City contractors, regardless of where it occurs.[13] Like the Massachusetts statute invalidated in *Natsios*, the practical effect of the San Francisco ordinance is to export the government's social policy far beyond its borders. That effect constitutes a direct regulation of interstate commerce that is a *per se* violation of the dormant Commerce Clause. *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State"); *Brown-Forman Distillers Corp. v. New York St. Liquor Authority*, 476 U.S. 573, 579 (1986) (same).

The result of the Ninth Circuit's ruling is that the City has the power to impose social conditions through its contracts. That ruling is in conflict with *Natsios* as well as this Court's opinion in *Wunnicke*. This Court's precedents do not permit a state, much less a city, to regulate conduct beyond its borders through contracts.

B. The Ninth Circuit, in Effect, Held that a City May Control Conduct throughout the Nation If There Is No Conflicting Legislation.

The Ninth Circuit rejected S.D. Myers' argument that the ordinance could conflict with the laws of other states.[14] It held:

> By choosing to attack the Ordinance on its face, Myers has the burden of showing that the Ordinance will have

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[13]Employee benefits obviously constitute commerce, or ERISA would be invalid. *Cf. Cannon v. Group Health Serv. of Okla.*, 77 F.3d 1270, 1275 (10th Cir. 1996) (referring to the "Commerce Clause authority to enact ERISA").

[14]Section II.C. *infra* discusses the court's failure to address S.D. Myers' as-applied challenge to the extraterritorial effect of the ordinance.

> the practical effect of directly regulating interstate commerce under all circumstances. This means that, at a minimum, *Myers must either present evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent.*

S.D. Myers, 253 F.3d at 469-70 (emphasis added). In other words, if there is no conflicting legislation in place or imminent, San Francisco may export its social policy without constraint.

Such a holding does not comport with this Court's Commerce Clause or Due Process Clause cases. It is beyond dispute that "[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). In a similar vein, this Court has observed that "while we do not doubt that Congress has ample authority to enact . . . a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States." *BMW*, 517 U.S. at 571 (citing *Bonaparte*); *see also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976) ("at least since . . . [1852] it has been clear that 'the Commerce Clause . . . even without implementing legislation by Congress is a limitation upon the power of the States'") (citations omitted). If a state may not impose its policy choices on the entire nation, neither may a city.

Most importantly, inconsistent legislation has subsequently been proposed and adopted. "This Court's . . . Commerce Clause cases . . . have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (citing cases). Inconsistent regulations, within this Court's jurisprudence, are not limited to statutes that

are so in conflict that it is impossible to comply with both. For instance, in *Brown-Forman*, the plaintiff was able to comply with all applicable laws, providing it gave up its ability to give promotional prices in other states. *Brown-Forman*, 476 U.S. at 583-84. The statute at issue in *Healy* was also deemed inconsistent with other state's regulations, even though it was possible to comply with each. *Healy*, 491 U.S. at 339; *see also id.* at 336-37 ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"). The issue of inconsistent regulations is not whether employers may comply with the ordinance and other state's laws, but whether the ordinance affects employers' ability to take advantage of the laws of other states in which they do business.

Article I, § 29 of the Nebraska Constitution gives employers a state constitutional right not to offer domestic partner benefits to same-sex couples in Nebraska.[15] *See* Neb. Const. art. I, sec. 29 (2000), App. 171a.[16] The pending Michigan constitutional amendment would give employers a right not to treat domestic partnerships as the equivalent of marriage. *See* MI Senate Resolution E (2003), App. 172a.[17] Because the ordinance requires that employers treat registered domestic partnerships as the equivalent of marriage, it is

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[15]Nebraska employers need not offer benefits to opposite-sex domestic partners either because the state does not recognize cohabitation as the equivalent of marriage. *See Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554, 560 (1956) (common law marriage abolished).

[16]According to SFHRC, there are Nebraska contractors who offer domestic partner benefits in compliance with the ordinance. Five-Year Report at 7, Figure 10, App. 114a. Those employers have relinquished a state constitutional right in order to do business with San Francisco. A state (or city) may not require a corporation to waive a constitutional right to do business in its jurisdiction. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922).

[17]Available at www.michiganlegislature.org/documents/2003-2004/ jointresolutionintroduced/senate/pdf/2003-SIJR-E.pdf

inconsistent with these provisions. The conflict between the ordinance and the provisions of these laws represents the kind of inconsistent rights and obligations that repeatedly have been held to violate the dormant Commerce Clause. *See Healy*, 491 U.S. at 336-37; *CTS Corp.*, 481 U.S. at 88; *Brown-Forman*, 476 U.S. at 583-84.

C. The Ninth Circuit's Misconstrual of the Nature of a *per se* Dormant Commerce Clause Violation Is in Conflict with the Second Circuit.

S.D. Myers argued before the trial court and on appeal that the extraterritorial effects of the ordinance *as applied* rendered it invalid *per se*. See Summary Judgment at 19-20, App. 39a (S.D. Myers "argue[s] that the Ordinance is invalid *per se* because it directly affects [S.D. Myers] by subjecting it to inconsistent legislation"); S.D. Myers Opening Br. at 42-44 (arguing extraterritorial effects on S.D. Myers in Ohio). Nevertheless, the Ninth Circuit treated the *per se* claim as facial only, and held that S.D. Myers could not succeed without establishing that there is no set of circumstances under which the ordinance would be valid. *S.D. Myers*, 253 F.3d at 466-67, 471.[18]

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[18]The Ninth Circuit compounded its error by ruling factually against S.D. Myers on an uncontroverted claim it made in the district court–that the ordinance applied to its Ohio operations. See Summary Judgment at 21, App. 40a ("SDMI also argues that the Ordinance directly affects its operations in Ohio"). The defendants never denied that the ordinance would apply to all S.D. Myers employees in Ohio, since S.D. Myers intended to use Ohio based employees to perform the contract. Cf. Dana S. Myers Aff., ¶ 10, App. 97a. The trial court made no finding against S.D. Myers on this issue, for which it would have been required to give S.D. Myers the benefit of any doubt in granting summary judgment for the City. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("all justifiable inferences are to be drawn in [the nonmovant's] favor"); Fed. R. Civ. P. 56(e) (unrebutted affidavit must be taken as true). Yet the Ninth Circuit decided to construe the ordinance as not applying to S.D. Myers' Ohio employees. *S.D. Myers*, 253 F.3d at 468-69. In view of S.D. Myers' uncontroverted claim, this is an improper finding of fact on appeal.

In holding that the ordinance does not directly regulate interstate commerce unless it is facially invalid, the Ninth Circuit's opinion is in conflict with a recent decision of the Second Circuit as well as decisions of this Court. *See American Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2nd Cir. 2003) (Vermont's "harmful to minors" law a *per se* violation of the dormant Commerce Clause as applied to persons placing information on internet); *Healy*, 491 U.S. at 335-40 (practical effect of the statute was to control prices; facial invalidity was second ground for decision); *Brown-Forman*, 476 U.S. at 583-584 (statute invalid under as-applied analysis).[19]

III. THE NINTH CIRCUIT FAILED TO RECOGNIZE THAT A CITY HAS NO LEGITIMATE INTEREST IN PROTECTING NON-RESIDENTS.

This Court has held that a governmental entity has no legitimate interest in imposing burdens on interstate commerce to protect persons outside its borders:

> While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, *there is nothing to be weighed in the balance to sustain the law.*

Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (emphasis added). The Illinois statute at issue in *MITE* regulated corporate takeovers of public companies of which Illinois residents owned 10 percent or more of the stock. *Id.* at 626-27. The asserted justification for the ordinance was "to protect

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See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (Court of Appeals "should not simply have made factual findings on its own").

[19]On the other hand, to the extent the Ninth Circuit simply ignored the as-applied challenge, and held S.D. Myers to the higher standard of facial claims, this Court should exercise its supervisory power by vacating and remanding for consideration of the actual claim.

resident security holders . . . ." *Id.* at 644. But for most transactions regulated by the statute, the majority of the shareholders affected would be nonresidents. In addition, an exemption left shareholders without the protections the statute purportedly provided when it came to a corporation's purchase of its own shares. *Id.* The Court found that this inconsistency with the asserted purpose "undermine[d] appellant's justification for the burdens the statute impose[d] on interstate commerce." *Id.*

The Ninth Circuit's decision is in conflict with *MITE*. None of S.D. Myers' employees are San Francisco residents, so San Francisco has no legitimate interest in protecting them. Nevertheless, in purporting to weigh the burden on interstate commerce against the City's interest, the Ninth Circuit failed to recognize that there was no local interest to weigh.[20] *S.D. Myers*, 253 F.3d at 471-72. The court criticized S.D. Myers for being unable to quantify the economic impact of the ordinance on interstate commerce. *Id.* at 471 ("Myers . . . provides almost no indication of the economic impact of the Ordinance on interstate commerce").[21] But the court failed to articulate any legitimate interest of the City in the analysis. *Id.* at 471-72.

Simply put, the Court erred in failing to recognize that the City has no interest to weigh against the burden of imposing its social policy on employers with nonresident employees. Most of the employees affected by the San Francisco ordinance are nonresidents and never work in San Francisco. Even though a

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[20]This Court has held that where a burden on interstate commerce is indirect, "we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

[21]The court quoted S.D. Myers' response to an interrogatory related only to employees that would work on the contract, and ignored other responses that estimated that costs for domestic partner benefits would be equal to or greater than for married employees.

1998 court decision limits the City's ability to enforce the ordinance in all of a contractor's U.S. operations, as originally drafted and construed, "just over one percent of the complying companies" have chosen to limit the geographic reach of their domestic partner benefits. Five-Year Report at 1, 5-6, App. 104a, 112a. Of the companies that comply with the ordinance by offering domestic partner benefits, 3,405 offer them nationwide. *Id.* at 5, App. 112a (3,500-95). "City contractors offering domestic partner benefits employ *a nationwide pool* of approximately 1,722,000 people . . . ." *Id.* (emphasis added). Nearly 60 percent of contractors offering domestic partner benefits are located outside of San Francisco, and "can be found in at least 39 states and the District of Columbia, and in almost 500 cities nationwide." *Id.* at 6, App. 113a. The City clearly has no legitimate interest in imposing its policy choices on businesses operating outside its borders, particularly those with no San Francisco residents as employees. *MITE*, 457 U.S. at 644; *BMW*, 517 U.S. at 571; *Natsios*, 181 F.3d at 69.

Moreover, as in *MITE*, the City's purported interest in the ordinance is inconsistent with the actual effect. According to the City:

> San Francisco has a long tradition of including in City contracts a promise by contractors not to discriminate against their own employees based on their sexual orientation. The ordinance is designed to give economic meaning to the promise.

City's 9th Cir. Resp. at 1. If by "giv[ing] economic meaning" the City means economic benefit based on sexual orientation, the ordinance fails to serve the alleged purpose.[22] Significantly, the ordinance *permits contractors to comply by offering no employee benefits whatsoever*, and permits waivers from

[22]On the other hand, if "giv[ing] economic meaning" refers to exacting an economic penalty for noncompliance, the City has admitted a violation of the standard in *BMW*, 517 U.S. at 572.

compliance freely. As of November 14, 2002, San Francisco appears to have had contracts with 9,426 contractors, only 37 percent (3,501) of which offered domestic partner benefits to employees. Five-Year Report at 3, App. 108a.[23] Moreover, a Census 2000 report, also published after the decision at issue, demonstrates that 89 percent of domestic partner households are opposite-sex couples (who could marry if they wished to provide for each other financially). Tavia Simmons & Grace O'Neill, *Households and Families: 2000, Census 2000 Brief* at 7 (Sept. 2001).[24] Thus, it is clear that less than two fifths of San Francisco's contractors comply with the ordinance by offering domestic partner benefits, and most domestic partners are opposite-sex couples. Accordingly, the ordinance would provide only de minimus economic support for San Francisco's sexual orientation policy even if all the employees affected were in San Francisco.

Like the Illinois statute in *MITE*, the San Francisco ordinance primarily relates to persons outside its borders and fails to provide the benefits that purportedly justify its impact on interstate commerce. The Ninth Circuit should have followed *MITE* and held that San Francisco has no local interest to be weighed against the burden on interstate commerce. If a state has no legitimate interest in protecting residents of other states, neither does a city.

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[23]The Five-Year Report shows that the compliance status of 8,163 contractors has been determined, and another 1,263 contractors have received waivers. Five-Year Report at 3, 8 and Table 1, App. 106a, 116a. It is not clear from the report whether all of the contractors whose status has been determined currently have contracts with the city. Nevertheless, if they do not, their compliance is hardly relevant to any legitimate City interest.

[24]Available at www.census.gov/prod/2001pubs/c2kbr01-8.pdf. Census 2000 found that over the past ten years, "the number of unmarried-partner households had increased to 5.5 million, of which, 4.9 million consisted of partners of the opposite sex." *Id.* The 600,000 same-sex partner households constitute just over ½ of 1 percent of all households. *See id.* at 1 (105.5 million households).

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT CERTIORARI, VACATE THE NINTH CIRCUIT'S OPINION, AND REMAND FOR CONSIDERATION OF INFORMATION THAT WAS NOT BEFORE THE COURT AT THE TIME OF ITS OPINION.

This Court will grant certiorari, vacate the opinion and remand for further consideration ("GVR") when:

> intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . .

Lawrence v. Chater, 516 U.S. 163, 167 (1996); *see also Stutson v. United States*, 516 U.S. 193, 194 (1966) ("*Lawrence v. Chater* . . . contains a general discussion of the considerations that properly influence this Court in deciding whether to [GVR]").

There is a reasonable probability that the decision below rests upon stated assumptions that the Ninth Circuit would reject if given the opportunity to consider subsequent events. These developments include the conflicting legislation and the SFHRC Statistical Reports referenced above. Article 1, § 29 of the Nebraska Constitution and the proposed Michigan constitutional amendment give employers the right not to recognize "domestic partnerships." If the Ninth Circuit were to consider these inconsistent regulations, it should hold that the ordinance creates an impermissible conflict with legislation in other states. *Cf. S.D. Myers*, 253 F.3d at 469. The SFHRC Statistical Reports clearly reveal the extraterritorial effect of the ordinance. If the Ninth Circuit were to consider the SFHRC

Reports, it should hold that the ordinance has an extraterritorial effect and a direct impact on interstate commerce. Thus, at a minimum this Court should vacate the decision at issue and remand to permit the Ninth Circuit to consider the outcome-determinative facts that were not before it.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari.

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December 23, 2003

APPENDIX A

253 F.3d 461

United States Court of Appeals,
Ninth Circuit.

S.D. MYERS, INC., Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO and San Francisco Human Rights Commission, Defendants-Appellees.

No. 99-16397.

Argued and Submitted Nov. 14, 2000
Filed June 14, 2001

Before: WALLACE, FISHER, and RAWLINSON, Circuit Judges.

WALLACE, Circuit Judge:

S.D. Myers, Inc. (Myers) appeals from a summary judgment in favor of the City and County of San Francisco (City). Myers argues that Chapter 12B of the San Francisco Administrative Code (Ordinance) is invalid under the dormant Commerce Clause, Due Process Clause, and California law. The Ordinance requires contractors with the City to provide nondiscriminatory benefits to employees with registered domestic partners. Myers also asserts that the district court erred when it determined that Myers lacked standing to argue that the Ordinance is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* The district court had jurisdiction under 28 U.S.C. §§

1331, 1343, and 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm, but remand for the district court's consideration an issue raised for the first time in this appeal.

I

For nearly thirty years, the City has pledged not to do business with entities that discriminate on the basis of sexual orientation. *See Air Transport Ass'n of America v. City & County of San Francisco,* 992 F.Supp. 1149, 1156-57 (N.D.Cal.1998). In the spring of 1997, the City, in an effort to enhance that promise by adding concrete requirements, enacted the Ordinance, which provides as follows:

> No contracting agency of the City, or any department thereof, acting for or on behalf of the City and County, shall execute or amend any contract ... with any contractor that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any [other] benefits ... between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to State or local law authorizing such registration....
> Ordinance § 12B.1(b).

The Ordinance states that this requirement of nondiscrimination extends to

> (i) any of a contractor's operations within San Francisco; (ii) a contractor's operations on real property outside of San Francisco owned by the City or which the City has a right to occupy if the contractor's presence at that location is connected to a contract or property contract with the City;

> [and] (iii) where the work is being performed by a contractor for the City within the United States.

Id. § 12B.1(d). If a contractor is found to have breached these nondiscrimination requirements, the City may impose a $50 penalty per day for each employee affected by the discrimination and may terminate or suspend the contract, in whole or in part. *Id.* § 12B.2(h). In addition, the breaching contractor may be deemed an "irresponsible bidder" and be barred from contracting with the City for up to two years. *Id.* § 12B.2(i).

In 1997, Myers, an Ohio-based corporation, bid on a servicing contract for City-*466 owned electrical transformers located in Tuolomne County, California. The City notified Myers that the company was the low bidder on the contract, but that in order to be a "responsive bidder," Myers was required to certify its willingness to comply with the Ordinance. Myers declined to certify because compliance with the Ordinance was contrary to the religious and moral principles adhered to by the corporation. Upon Myers's failure to issue the required certification, its bid was rejected by the City.

Myers filed suit urging that the Ordinance be held invalid under the Commerce Clause, Due Process Clause, ERISA, and California law and prayed for relief in the form of a declaratory judgment, an injunction, and money damages. On cross-motions for summary judgment, the district court upheld the Ordinance, except as to a provision, not at issue in this appeal, which required contractors to abide by the Ordinance at "any of a contractor's operations elsewhere within the United States." *See Air Transport Ass'n,* 992 F.Supp. at 1163-64. In a companion case, the district court determined that ERISA preempted the Ordinance as to benefits "covered by ERISA and provided through ERISA plans." *Id.* at 1180.

However, the district court did not extend this ruling to Myers because it held that Myers did not have standing to argue

ERISA preemption. The district court reasoned that a decision in Myers's favor grounded in ERISA would not redress the injury to Myers in light of its stipulation that "Myers is unwilling to comply with any of the City's equal benefits requirements, even if Myers' unwillingness to comply means that Myers would consequently be ineligible for the award of a City contract."

II

The district court's entry of summary judgment and its resolution of state and federal constitutional issues are reviewed de novo. *See Salve Regina College v. Russell,* 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); *Valley Bank of Nevada v. Plus System, Inc.,* 914 F.2d 1186, 1189 (9th Cir.1990). We will affirm if the district court applied the correct substantive law and the evidence reveals no genuine issue of material fact when viewed in the light most favorable to the party opposing summary judgment. *See Valley Bank,* 914 F.2d at 1189.

A.

In reviewing challenges to local regulations under the Commerce Clause, we follow a two-tiered approach:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (internal

citations omitted); *see also NCAA v. Miller,* 10 F.3d 633, 638 (9th Cir.1993). The "central rationale" of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

***467** "Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause." *White v. Mass. Council of Constr. Employers, Inc.,* 460 U.S. 204, 210, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); *see also J.F. Shea Co. v. City of Chicago,* 992 F.2d 745, 748 (7th Cir.1993). For purposes of this appeal, we assume, without deciding, that the City is regulating rather than participating in the market through its enforcement of the Ordinance.

1.

Myers first contends that the Ordinance is facially invalid under a first tier inquiry because it "directly regulates interstate commerce." *NCAA,* 10 F.3d at 638. "Direct regulation occurs when a state law directly affects transactions that take place across state lines or entirely outside of the state's borders." *Valley Bank,* 914 F.2d at 1189-90 (internal quotations omitted). The Supreme Court has emphasized that the "practical effect" of a challenged statute is "the critical inquiry" in determining whether that statute constitutes direct regulation. *Healy v. Beer Inst.,* 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *see also Valley Bank,* 914 F.2d. at 1190. "[P]ractical effect ... must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate

regulatory regimes of other States...." *Healy,* 491 U.S. at 336, 109 S.Ct. 2491; *see also NCAA,* 10 F.3d at 639-40; *Valley Bank,* 914 F.2d at 1191- 92.

In order to prevail on this facial challenge to the Ordinance, Myers must meet a high burden of proof; it must "establish that no set of circumstances exists under which the [Ordinance] would be valid. The fact that [the Ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Myers asserts we should not apply *Salerno* and argues that *Salerno* has been undermined by recent Supreme Court cases. In place of *Salerno,* Myers would have us craft a new standard, based upon language in *Planned Parenthood v. Casey,* 505 U.S. 833, 895, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), that would hold a law to be facially unconstitutional when it would operate as a substantial obstacle to an otherwise lawful course of action in a large fraction of relevant cases.

Myers supports its argument by pointing out that a plurality of Supreme Court Justices has stated in dicta, "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation." *City of Chicago v. Morales,* 527 U.S. 41, 55 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Stevens, J., with two Justices concurring). However, another plurality of Justices is equally adamant that *Salerno* is the correct standard in every context, with the exception of certain First Amendment cases. *See Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 2655-56, 147 L.Ed.2d 743 (2000) (Thomas, J., dissenting, joined by two Justices); *Planned Parenthood of S. Arizona v. Lawall,* 180 F.3d 1022, 1026 (9th Cir.1999). While we have held that *Casey* "overruled *Salerno* in the context of facial challenges to abortion statutes," *Lawall,* 180 F.3d at 1027, we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so. *See Rodriguez de Quijas v.* ***468** *Shearson/American*

Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Myers asserts that the Ordinance directly regulates interstate commerce because (1) section 12B.1(d)(i) requires out-of-state contractors with the City to provide equal benefits to all employees located in the City even if they are engaged in business unrelated to a City contract; (2) section 12B.1(d)(iii) requires out-of-state contractors to provide equal benefits to all employees at an out-of-state location if any employees at that location are working on a City contract; and (3) other municipalities and states may adopt legislation conflicting with the Ordinance, creating an administrative nightmare for City contractors.

In assessing this argument, we must first decide whether Myers has accurately described the face of the Ordinance. Since Myers will prevail under *Salerno* only if the Ordinance must necessarily be read as directly regulating interstate commerce, we construe the Ordinance narrowly and resolve any ambiguities in favor of the interpretation that most clearly supports constitutionality. *See Able v. United States*, 88 F.3d 1280, 1297 (2d Cir.1996).

The most obvious problem with Myers's reading is that the Ordinance contains no language explicitly or implicitly targeting either out-of-state entities or entities engaged in interstate commerce. Rather the Ordinance applies to all contractors with the City without any reference to the type or extent of a contractor's commercial operations. The Ordinance is therefore unlike the statute we held unconstitutional in *NCAA* which by its terms applied only to "*national* collegiate athletic associations which have member institutions in 40 or more

states." 10 F.3d at 638 (emphasis added). The only such national association was the NCAA, an organization that must actively engage in interstate commerce in order to function properly. *Id.; see also Healy,* 491 U.S. at 341, 109 S.Ct. 2491 ("By its plain terms, the Connecticut affirmation statute applies solely to interstate brewers or shippers of beer, that is, either Connecticut brewers who sell both in Connecticut *and* in at least one border State or out-of-state shippers who sell both in Connecticut and in at least one border State."); *Edgar v. MITE Corp.,* 457 U.S. 624, 641, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (plurality opinion) ("The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines.... A tender offer for securities of a publicly held corporation is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across the country....").

There is also a problem with Myers's characterization of section 12B.1(d)(iii), which states that the Ordinance applies "where the work is being performed by a contractor for the City within the United States." We agree with Myers that under one interpretation of this provision contractors would be required to provide nondiscriminatory benefits to all employees at a non-City location if there were any employees working on a City contract at the non-City location. However, that is not the only plausible interpretation of the provision supported by the record before us. Another way to read this section is that contractors are required to provide nondiscriminatory benefits to employees working on a City contract, no matter where those employees are located.

***469** A narrow reading of the Ordinance's scope yields an interpretation in which the City (1) requires all contractors with the City to provide equal benefits to all employees located in the City even if they are engaged in business unrelated to a City contract; and (2) requires all contractors to provide equal benefits to those employees working on a City contract even if

those employees are located on non-City property. As so construed, employers are "subject to" the Ordinance only as to employees that have direct contact with the City. *See Edgar,* 457 U.S. at 643, 102 S.Ct. 2629 (plurality opinion) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts," citing *Shaffer v. Heitner,* 433 U.S. 186, 207, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), which held that "[t]he standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard.")[1]

Further, the Ordinance will affect an out-of-state entity only after that entity has affirmatively chosen to subject itself to the Ordinance by contracting with the City. While we assume for purposes of this opinion that the City is acting in a regulatory capacity rather than as a market participant, it is significant to our "direct regulation" inquiry that the City imposes the Ordinance through contract rather than by legislative fiat. *See Automated Salvage Transport, Inc. v. Wheelabrator Envtl. Sys., Inc.,* 155 F.3d 59, 78 (2d Cir.1998) (holding that although a settlement agreement between a state agency and Wheelabrator "affect[ed] the conduct of the Wheelabrator defendants outside of [the state], it is the antithesis of 'direct' regulation").

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[1]We do not decide whether the Ordinance could be constitutionally applied in its broader reading--i.e., that contractors are required to provide nondiscriminatory benefits to all employees at a non-City location if there are any employees working on a City contract at that location. Under the *Salerno* standard, the Ordinance is facially constitutional if there is at least one "set of circumstances" under which it could be valid. *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. We posit the narrow reading as one such set of circumstances.

This part of our Commerce Clause inquiry, however, is not complete for we must determine the "practical effect" of the Ordinance by considering how the Ordinance will interact with the legitimate regulatory regimes of other state and local governments. *See Healy,* 491 U.S. at 336, 109 S.Ct. 2491. Myers hypothesizes,

> Conflicts could arise when other local jurisdictions define the "partnership" or require benefits in ways that could not be reconciled with the City's requirements. For example, [Myers] might comply with the Ordinance by eliminating a marital benefit, then be confronted by another city's regulation that does not permit that option. Similarly, cities that do not want to advance a public policy affirming nonmarital cohabitation might instruct their purchasing agents not to do business with any contractor that provides "domestic partner" benefits to unmarried couples.

Myers's speculation fails, however, to take into account the *Salerno* standard.

By choosing to attack the Ordinance on its face, Myers has the burden of showing that the Ordinance will have the practical effect of directly regulating interstate commerce under all circumstances. This means that, at a minimum, Myers must either present evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation *470 is both actual and imminent. *See Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 448, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) ("And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none.... [N]o impermissible burden on commerce has been shown.").

Myers argues that the Supreme Court has held that we are required to speculate about possible legislation that may be enacted. However, upon close examination of Supreme Court

precedent it is apparent that the Court has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation. In *Healy,* for example, the Court determined that a Connecticut price affirmation statute was unconstitutional under the dormant Commerce Clause in part because "the practical effect of [the] affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." 491 U.S. at 337, 109 S.Ct. 2491. The Court then went on to analyze the effects of three such conflicting statutes that had been enacted in Massachusetts, New York, and Rhode Island. *Id.* at 337-39, 109 S.Ct. 2491. In addition, in *Healy* the threat of additional conflicting legislation was real and not speculative. The Court pointed out that "[a]t the time of our decision in *Brown-Forman* [three years earlier], 39 States ... had adopted affirmation laws." *Id.* at 334 n. 10, 109 S.Ct. 2491; *see also Brown- Forman,* 476 U.S. at 583, 106 S.Ct. 2080 ("the proliferation of state affirmation laws ... has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States."); *Edgar,* 457 U.S. at 631 n. 6, 102 S.Ct. 2629 ("Takeover statutes are now in effect in 37 States.").

Our precedent follows this interpretation of the Supreme Court's holding in *Healy.* In *NCAA* we stated

> Nevada is not the only state that has enacted or could enact legislation that establishes procedural rules for NCAA enforcement proceedings. Florida, Illinois, and Nebraska have also adopted due process statutes and similar legislation has been introduced in five other states.... The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause.

NCAA, 10 F.3d at 639-40 (internal footnotes omitted). Myers makes much of our phrase "or could enact legislation," asserting that it requires us to hypothesize about potential future conflicts. However, it is clear in context that the likelihood of conflicting legislation in *NCAA* was far from speculative. Such legislation had in fact been adopted by three states and introduced in five states. In addition, we emphasized that the risk of inconsistent regulation was "serious." *Id.* at 640; *see also Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1293 (3d Cir.1992) ("Although the Supreme Court has at times invalidated a state regulation because of the *possibility* that it might conflict with another state's regulation, in more recent cases the Court has required a demonstration of actual conflict." (internal quotations omitted)); *Valley Bank*, 914 F.2d at 1192 ("[The plaintiff] speculates that other states will pass similar but inconsistent legislation....").

Because Myers has not brought to our attention any actual or pending legislation that conflicts or would conflict with the ***471** Ordinance, we uphold the Ordinance against Myers's facial attack under the Commerce Clause.

2.

Myers argues that even if the Ordinance is not facially invalid under a first-tier inquiry that the Ordinance should be invalidated as applied because the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Under the *Pike* balancing approach, "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved...." *Id.* We have stated, "Even in the context of dormant commerce clause analysis, the Supreme Court has frequently admonished that

courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation." *Pac. Northwest Venison Producers v. Smitch,* 20 F.3d 1008, 1017 (9th Cir.1994) (internal quotation omitted); *see also Alaska Airlines, Inc. v. City of Long Beach,* 951 F.2d 977, 983 (9th Cir.1991) ("For a facially neutral statute to violate the commerce clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational.").

Of course, the Ordinance affected Myers: the City decided not to contract with Myers after Myers refused to certify that it would comply with the Ordinance. On appeal and in the district court, Myers has relied solely on conclusory statements about the burden the Ordinance has on interstate commerce. For example, in response to an interrogatory asking Myers to provide an estimate of the cost to itself of implementing a benefits program for domestic partners of employees, Myers stated, "[Myers] cannot offer an estimate specific to the contract that is at issue in this lawsuit, as it is not known if any of the employees who would have been assigned have, or would have acquired, 'domestic partners.' " Myers did state that the cost of providing only family medical benefits was approximately $300 per month; however, this figure provides almost no indication of the economic impact of the Ordinance on interstate commerce. While we do not require a dollar estimate of the effect the Ordinance will have, we do require specific details as to how the costs of the Ordinance burdened interstate commerce. The Commerce Clause is concerned with the free flow of goods and services through the several states; it is the *economic* interest in being free from trade barriers that the clause protects. *See Carbone,* 511 U.S. at 390, 114 S.Ct. 1677; *On the Green Apartments L.L.C. v. City of Tacoma,* 241 F.3d 1235, 1238 (9th Cir.2001).

Myers also challenges the legitimacy of the purported benefits of the Ordinance to the City. We held in *Alaska Airlines,* 951

F.2d at 983, that the burdens on interstate commerce of a statute will outweigh the benefits if the "asserted benefits of the statute are in fact illusory." Myers argues that the benefits arising out of the Ordinance are illusory because the Ordinance allows contractors and vendors with the City to avoid the effects of the Ordinance by seeking a "sole source" exemption. This exemption has been granted by the City on numerous occasions. For example, when the City wanted to buy unique pieces of art for the airport, it waived the application of the Ordinance as to the "sole source," the art broker, from whom it could purchase the art. The sole source exemption, however, is a rational response to the problems that might arise for the ***472** City should the sole source of a needed (or desired) product or service refuse to do business with the City on account of the Ordinance. The City "need not strike all evils at the same time." *Katzenbach v. Morgan,* 384 U.S. 641, 657, 86 S.Ct. 1717 (1966) (internal quotation omitted). We hold that the burden on interstate commerce evidenced in the record does not clearly outweigh the City's legitimate interest in applying the Ordinance to those with whom it contracts.

B.

Myers next argues that the Ordinance is facially invalid under principles of due process because the Ordinance exerts extraterritorial control over Myers's lawful choice not to provide benefits to domestic partners. For this assertion, Myers relies primarily upon *BMW of N. America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), in which the Supreme Court stated, "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572, 116 S.Ct. 1589. The Supreme Court stated that "[t]o avoid such encroachment, the economic penalties that a State ... inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the

State's interest in protecting its own consumers and its own economy." *Id.*

In order for Myers to succeed on this argument, it must first persuade us that the provisions of the Ordinance constitute "economic penalties" under *BMW*. The Ordinance does provide that a contractor who has agreed to comply with the Ordinance and then breaches that promise will be subject to economic consequences, including fines. Ordinance §§ 12B.2(h)-(i). In addition, the City will refuse to contract with those who fail to certify that they will comply with the Ordinance. These economic consequences, however, are significantly different from the "economic penalties" disfavored in *BMW*, which dealt with punitive damages awarded in a state tort case. Punitive damages are imposed on unwilling defendants. *See BMW*, 517 U.S. at 568, 116 S.Ct. 1589. The breach of contract provisions in the Ordinance will only apply if a City contractor consents to be bound by its terms. Similarly, an entity will be denied the ability to contract with the City only after it has chosen not to meet the City's requirements.

Even were we to assume that the Ordinance's requirements constitute an economic penalty, narrowly construed the Ordinance only applies in the City, on City-owned property, or as to employees working on a City contract. Thus, the Ordinance is "supported by the [City]'s interest in protecting its own consumers and its own economy." *Id.* at 572, 116 S.Ct. 1589. While it is possible that the City could attempt to wield extraterritorial control through broadly interpreting section 12B.1(d)(iii), on this facial challenge we will not invalidate the Ordinance unless Myers can "establish that no set of circumstances exists under which the [Ordinance] would be valid." *See Salerno*, 481 U.S. at 745, 107 S.Ct. 2095.

C.

Article 11, section 7 of the California constitution provides, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." A charter city, like the City, may "make and enforce all ordinances and regulations in respect to municipal affairs ... [I]n respect to other matters they shall be subject to general laws." ***473** Cal. Const. art. 11, § 5. Myers makes two arguments based on these constitutional provisions. First, Myers argues that the recently enacted California Family Code (Family Code) § 297 *et seq.* is a general law conflicting with, and thereby preempting, the Ordinance. Second, Myers asserts that the Ordinance constitutes extraterritorial, governmental regulation prohibited by the California constitution.

1.

Family Code § 297 *et seq.* was not signed into law until October 2, 1999, after the district court had already ruled on Myers's claims. Thus, this issue is raised for the first time on appeal. Generally, we will not consider such arguments. *See United States v. Carlson,* 900 F.2d 1346, 1349 (9th Cir.1990). We have, however, recognized an exception when "a change in the law raises a new issue pending appeal." *In re Home America T.V.- Appliance Audio Inc.,* 232 F.3d 1046, 1052 (9th Cir.2000). Rather than deciding the merits of this argument on the record we now have before us, we remand this issue to the district court to decide.

2.

Myers contends that the Ordinance is invalid under the California constitution because the Ordinance has the effect of regulating outside the geographic boundaries of the City. When interpreting state law, we are bound by decisions of the state's

highest court. *Strother v. S. Cal. Permanente Med. Group,* 79 F.3d 859, 865 (9th Cir.1996). If there is no such decision available, then we "must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* (internal quotation omitted).

The California Supreme Court has held, "A municipal corporation has generally no extraterritorial powers of regulation. It may not exercise its *governmental* functions beyond its corporate boundaries." *City of Oakland v. Brock,* 8 Cal.2d 639, 67 P.2d 344, 345 (1937) (emphasis added). The City may, however, exercise *proprietary* powers with respect to property it owns even if that property lies outside the City's corporate boundaries. *Air Cal, Inc. v. City & County of San Francisco,* 865 F.2d 1112, 1117 (9th Cir.1989). The proprietary power encompasses the ability of the City as owner to enter into commercial relationships. *Id.*

An earlier incarnation of Ordinance Chapter 12B provided that contractors with the City were required to refrain from discrimination. In ruling on the validity of this ordinance, the California appellate court wrote,

> Chapter 12B ... is an exercise of the City's contracting power. The ordinance does not ban discrimination in employment but merely prescribes certain provisions in City contracts. Those who find such provisions burdensome may simply refuse to contract....
>
> In several opinions, the Attorney General has recognized that a local agency's insertion of nondiscrimination provisions in its contracts is an exercise of its contracting power which falls outside the scope of the police power.... In explaining the basis for his decision that the Berkeley Board of Education might properly include clauses prohibiting discrimination in employment in its construction contracts,

> the Attorney General observed that such clauses "would be intended and designed to protect the school district from entering into a contract for or expending funds on a project executed in a manner contrary to the laws of the state. Such ***474** clauses constitute examples of the exercise by the local entity of its contracting power, a determination of the nature of the contractual obligations it may desire to enter into and a requirement which provides a remedy not for the injured employee, but, instead, a remedy to the public agency for the special injury it suffers."

Alioto's Fish Co. v. Human Rts. Comm'n of San Francisco, 120 Cal.App.3d 594, 174 Cal.Rptr. 763, 768 (1981).

Myers argues that *Alioto's* should not apply in this case because the Ordinance requires not only nondiscrimination but the affirmation of a particular lifestyle. However, we believe that the changes are not so significant as to undermine *Alioto's* reasoning, and we hold that, under California law, the Ordinance is an exercise of the City's contracting power. As such, the City is not acting extraterritorially when it uses that power in conjunction with its proprietary power over City property.

In addition, the California Supreme Court recently indicated, although it did not decide, that California authority would support holding that "the mode in which a city chooses to contract is a municipal affair." *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n,* 21 Cal.4th 352, 87 Cal.Rptr.2d 654, 981 P.2d 499, 506 (1999). Here, Myers attacks the mode of contracting rather than the subject matter of any particular contract. That is, Myers is not arguing that the City exercised extraterritorial control in seeking bids on a service contract for the City electrical transformers (subject matter); instead, Myers contests the City's refusal to contract with those who fail to comply with the Ordinance (mode of contracting). We hold that under current

California law, the City's chosen mode of contracting is a municipal affair over which the City may exercise its authority without violating the California constitution. *See* Cal. Const. art. 11, § 5.

III.

Myers's final argument is that the district court erred in holding that Myers lacks standing to make an ERISA preemption claim. We review the question of standing de novo. *W. Radio Servs. Co. v. Espy,* 79 F.3d 896, 902 (9th Cir.1996). In order to satisfy the Constitution's case-or-controversy requirement, Myers must show

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Myers, as "the party invoking federal jurisdiction[,] bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To meet this burden at the summary judgment stage, Myers "must set forth by affidavit or other evidence specific facts" supporting each element. *Id.* (internal quotations omitted).

Myers stipulated that it was "unwilling to comply with any of the City's equal benefits requirements, even if Myers' unwillingness to comply means that Myers would consequently be ineligible for the award of a City contract." Myers went on to specify that while it provides non-ERISA benefits such as bereavement leave and family medical leave to married employees, it would be unwilling to provide those benefits to

employees with domestic ***475** partners. In light of this stipulation, the district court held Myers did not have standing as to its ERISA claim. The district court reasoned that Myers "has declared that it will not provide its non-ERISA benefits to domestic partners of employees. Thus [Myers] would still be ineligible to receive a contract with the City, so judicial relief on its ERISA preemption claim would not redress [Myers's] alleged injury...."

Myers argues that under *Larson v. Valente,* 456 U.S. 228, 243 n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (plurality decision), it has standing as to its ERISA claim because judicial relief would redress a "discrete injury." In *Larson,* the Unification Church alleged that a section of a Minnesota Act "imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers" (the fifty per cent rule) violated the Establishment Clause. *Id.* at 230, 102 S.Ct. 1673. The Minnesota Act as a whole provided that all charitable organizations, except religious organizations, were subject to registration and disclosure requirements. *Id.* at 230-31, 102 S.Ct. 1673. The fifty per cent rule created an exception to the broad exemption for religious organizations. *Id.* at 231-32, 102 S.Ct. 1673. Minnesota argued that the Unification Church lacked standing to attack the fifty per cent rule unless it could first establish that it was a religious organization. Minnesota reasoned that the registration requirements constituted the injury to the Church and that this injury could not be redressed unless the Unification Church both qualified for the religious organization exemption and prevailed on its Establishment Clause claim. The Supreme Court disagreed and held that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Id.* at 243 n. 15, 102 S.Ct. 1673.

Larson demonstrates that Myers would have standing even if it had struck at the Ordinance using only ERISA because encroachment on Myers's rights under ERISA would constitute a "discrete injury" traceable to the Ordinance and redressable by the injunctive and declarative relief requested by Myers. The stipulation, however, has a profound effect on the way we view Myers's alleged injury to his rights under ERISA: it is now evident that the alleged injury was never "actual or imminent" since Myers would not have contracted with the City even if Myers were required only to provide non-ERISA benefits. Myers's position would be analogous to that of the Unification Church in *Larson* only if the Unification Church had stipulated that it was *not* a religious organization and the Court still ruled on the constitutionality of the fifty per cent rule--a plainly preposterous result.

On appeal, Myers attempts to circumvent the effect of its stipulation by arguing that since the Ordinance requires equal treatment, it could simply refuse non-ERISA benefits to all its employees. Myers would then have the option of complying with the Ordinance without having to provide any benefits to employees with domestic partners. Myers did not make this argument before the district court. *See Carlson,* 900 F.2d at 1349 ("Our general rule is that we will not consider issues raised for the first time on appeal."). Nor did Myers attempt to withdraw or clarify the stipulation, which specifies that Myers provides non-ERISA benefits to married employees but that it would not provide such benefits to employees with domestic partners. The plain implication of this language is that Myers would continue to provide non-ERISA benefits to its married ***476** employees even if that meant it would be ineligible to contract with the City.

Thus, deciding Myers's claim under ERISA would be to render an unconstitutional advisory opinion. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating that advisory opinions have been

disapproved "from the beginning"). Myers's stipulation has shown its alleged injury under ERISA to be "hypothetical" and "conjectural" rather than "actual or imminent." *See Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation omitted).

AFFIRMED, AND REMANDED IN PART

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHER DISTRICT OF CALIFORNIA

S.D. MYERS, INC.,	No. C 97-04463 CW
Plaintiff,	ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
V.	AND GRANTING DEFENDANT'S
CITY AND COUNTY OF SAN FRANCISCO, and SAN FRANCISCO HUMAN RIGHTS COMMISSION,	CROSS-MOTION FOR SUMMARY JUDGMENT
Defendants.	

_____/

Entered on Civil Docket May 27 1999

Plaintiff S.D. Myers, Inc. (SDMI) moves for summary judgment on its claims that San Francisco's Domestic Partner Benefits Ordinance (the Ordinance), S.F. Admin. Code Chs. 12B & 12C, (1) violates the California Constitution by duplicating and contradicting State marriage and community property laws; (2) exceeds the City's charter powers; (3) is impermissibly extraterritorial under the Due Process Clause of the Fourteenth Amendment and dormant Commerce Clause of the United States Constitution; (4) unduly burdens interstate commerce under the dormant commerce Clause; and (5) is

preempted by the federal Employee Retirement Income Security Act (ERISA). [page 2]

Defendants City and County of San Francisco and the San Francisco Human Rights Commission (collectively referred to as the City) oppose SDMI's motion for summary judgment and cross-move for summary judgment on all of SDMI's claims on the grounds that the Ordinance is valid, the City properly rejected SDMI's bid as nonresponsive, and the City therefore has not violated any of SDMI's rights.

The Court finds that the City if entitled to summary judgment on all of SDMI's claims on the following grounds: (1) the Ordinance does not conflict with or duplicate the provisions of State marriage of community property law cited by SDMI; (2) it does not exceed the City's power under the City Charter; (3) sections 12B.1(d) (i) – (iii) and § 12B.1 (d) (iv), except as § (d) (iv) applies to out-of-State conduct, are not impermissibly extraterritorial; and (4) those sections do not unduly burden interstate commerce. Finally, because SDMI declares that it will not make the non-ERISA benefits it provides available to domestic partners of employees, even if the Court rules in SDMI's favor on its ERISA preemption claim, the Court finds that SDMI has not met its burden of showing that a favorable decision from this Court on its ERISA preemption claim would redress its alleged injury. SDMI thus lacks standing to bring its ERISA preemption claim. Accordingly, the Court does not consider that claim.

BACKGROUND

The Ordinance requires as a term of contracting with the City that every person or entity that enters into or amends a contract or lease with the City not discriminate during the term of the [page 3] lease or contract in the provision of benefits "between employees with domestic partners and employees with spouses . . . where the domestic partnership has

been registered with a governmental entity." See S.F. Admin. Code § 12B.1 (b) and § 12B.2 (b). The Ordinance aims to fulfill in economic terms a promise long required in City contracts: that parties doing business with the City not discriminate based on sexual orientation or marital status.

The Ordinance applies to any employee benefits but includes a non-exclusive illustrative list that includes bereavement leave, family medical leave, health benefits, membership and membership discounts, moving expenses, pension and retirement benefits and travel benefits. Id. At §§ 12B.1 (b), § 12B.2 (b). Within San Francisco, the City uses the Domestic Partner Registry established in Chapter 62 of the San Francisco Administrative Code to determine which persons other than the employee or spouse of an employee are entitled to benefits under the Ordinance. S.F. Admin. Code Ch. 62.

As enacted, the Ordinance's nondiscrimination policies apply to: (i) any of the contractor's operations within San Francisco, (ii) a contractor's operations on real property outside of San Francisco owned by the City or which the City has a right to occupy, (iii) a contractor's work in other places outside the City within the United States where work related to a City contract is being performed, and (iv) any of a contractor's operations elsewhere in the United States. Id. At §§ 12B.1 (d) (i) – (iv). This Court considered the scope of these provisions in Air Transport Association of America v. City and County of San Francisco, 992 F. Supp. 1149 (N.D. Cal. 1998) (ATA).

[page 4]

To ensure compliance with the Ordinance, the City requires that its contractors execute an affidavit attesting that they are complying with the Ordinance's requirements. Bidders are informed that if they are unable to comply with the requirements of Chapter 12B, the City will not do business with them except under limited circumstances. These circumstances include situations where a contractor is a "sole

source" supplier of goods or services that cannot otherwise be obtained, emergency situations endangering public health or safety, or situations in which a department or commission head determines that a contract is essential to a City service or project and there are not responsive bidders who will comply with the Ordinance. See HRC Rules of Procedure §§ V.A(1), V.A(2), V.A(5). A contractor's failure to comply with the Ordinance in a City contract (absent a sole source exemption or other exception) is considered a material breach, and subjects the contractor to fines, and suspension or termination of the contract in whole or in part. S.F. Admin. Code § 12B.2 (h).

SDMI is an Ohio-based corporation that provides maintenance services to private and government entities for large electrical transformers. SDMI has offices in California, Texas, Washington, South Carolina, Colorado, and Florida. SDMI states that it conducts its business in accordance with Christian biblical principles, and that among those principles is the belief that if SDMI "gave health insurance to unmarried partners of employees, (SDMI) would be approving of a lifestyle that God has said we are not to approve of." Complaint at 6:9-13. [page 5]

SDMI provides its employees with a variety of benefits, including health, vision, dental, disability, and life insurance. SDMI asserts that it also provides two non-ERISA benefits: bereavement pay and family medical leave. Spouses of SDMI employees may obtain the benefits SDMI offers at the option of the employee to who they are married. Non-spouses are ineligible to receive such benefits, even if they are registered domestic partners. SDMI has stipulated that it is "unwilling to comply with any of the City's equal benefits requirements," even if the provisions of the Ordinance are upheld, and even if its unwillingness "means that Myers would consequently be ineligible for the award of the City contract." Declaration of G. Scott Emblidge, filed December 9, 1998 (Emblidge Decl.),

Exh. D, Stipulation Regarding Plaintiff's Personnel and Benefits Policies, ¶ 3-4.

Prior to the enactment of the Ordinance, the City had contracted with SDMI to maintain electrical transformers on City property at Hetch Hetchy, in Tuolomne, California. Between 1995 and 1997, the City paid SDMI $358,564 in two contracts, which accounted for three-tenths of one percent of SDMI's gross revenues (of $118 million) in the period between 1995 and 1997.

In September, 1997, the City invited bids on a contract for maintenance services on City-owned electrical transformers located outside of the City limits. SDMI bid on the project, offering to provide the proposed services for $143,455.00. The City subsequently informed SDMI that it was the lowest qualified bidder, advised SDMI of the requirements of the Ordinance, and notified [page 6] SDMI that it would have to execute an affidavit attesting that it was in compliance with the Ordinance or its bid would be rejected as non-responsive.[1] SDMI then brought this action seeking declaratory and injunctive relief, as well as damages for the economic injury sustained by SDMI.

DISCUSSION

I. Legal Standard

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R.

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[1]Had SDMI obtained the contract, two crews of four Ohio-based employees would have been assigned to perform the work for the City on-site in California. At least three other SDMI employees would have performed contract-related work in Ohio.

Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. [page 7] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident and Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

II. State Constitutional and City Charter Restrictions

A. State Constitution

Under Article XI, § 7 of the California Constitution, a "county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7. If otherwise valid local legislation conflicts with State law, it is preempted by State law and is void. See Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993). Local legislation conflicts with State law if it "duplicates, contradicts, or enters an area fully occupied by general law." Id. (citations omitted). Legislation duplicates State law if it is coextensive therewith, contradicts State law if it is inimical thereto, and enters an area fully occupied by general State law if the

Legislature explicitly or impliedly has manifested an intent to occupy the area. Id. At 898-99.

Article XI, § 5 (a) of the California Constitution exempts from preemption by State law charter city provisions that address purely "municipal affairs." Under § 5 (a), a charter city "may make and [page 8] enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general law." Id.

When there is a putative conflict between a State statute and a charter city measure, the threshold inquiry is whether there is a genuine conflict between local legislation and State law. See California Federal Savings & Loan Ass'n v. City of Los Angeles, 54 Cal. 3d 1, 16-17 (1991). If local legislation conflicts, then the Court must determine whether the issue is a municipal affair or whether it implicates a Statewide concern. Id. "If it does not [conflict], a choice between the conclusion 'municipal affair' and 'statewide concern' is not required." Id. As the court explained in California Federal, "To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, irresolvable short of choosing between one enactment and the other." Id. At 16-17.

SDMI contends that the Ordinance violates Article XI, § 7 because it duplicates and contradicts State marriage and community property laws, and because it regulates personal relationships, which SDMI asserts is the sole province of the State. SDMI also argues that the Ordinance is not saved from preemption by § 5 (a) because the regulation of personal relationships is not a municipal affair. [page 9]

The Court finds that the Ordinance does not conflict with State law regarding marriage or community property. Neither does the Court find any evidence that the Ordinance regulates an area fully occupied by State law. Because the Court finds no genuine conflict between the Ordinance and the provisions cited by SDMI, the Court need not consider whether the subject matter of the Ordinance is a municipal affair or a Statewide concern.

1. Conflict with State Law

SDMI contends that the Ordinance, combined with the Domestic Partner Registry, duplicates and contradicts State marriage and community property laws contained in §§ 300, 500-511, 760 and 2580 of the California Family Code by establishing domestic partnerships as "pseudo-marriages" and assigning to those relationships community property rights.[2] SDMI also asserts that the Ordinance regulates personal relationships by encouraging otherwise marriageable individuals to remain in nonmarital unions, and thus enters an area fully occupied by State law.

a. Duplication or Contradiction

Section 300 of the California Family Code defines marriage as "a personal relationship arising out of a civil contract between a man and a woman." Cal. Fam. Code § 300. First, the Ordinance does not establish, or even address, the marital union of domestic partners. Second, [page 10] State law confers on married couples a series of rights exclusive to marriage, which are not addressed by the Ordinance and to which domestic partners are not entitled either under the Ordinance or State law. Among these rights are community property rights, Cal. Fam. Code § 750 et seq. , the right to

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[2]SDMI does not challenge the Domestic Partner Registry, S.F. Admin. Code Ch. 62, in this action.

receive spousal support, id. § 4300 et seq., and inheritance rights, Cal. Prob. Code § 6401.

SDMI also contends that the Ordinance duplicates and contradicts State community property laws in California Family Code §§760 and 2580 by giving domestic partners a status-based right to demand employment benefits outside of contractual employment agreements.[3] The Court disagrees.

First, State community property law does not govern what benefits government contractors must provide employees. Second, the Ordinance does not create community property rights for domestic partners, define the property rights of benefit recipients, or establish property rights for which domestic partners have a cause of action against employers.

Neither does the Ordinance contradict California statutes regarding "confidential marriage." Cal. Fam. Code §§ 500-511. SDMI argues that the Ordinance's effect is to "lure" otherwise marriageable partners away from marriage, in contravention of State law encouraging cohabitants to legalize their relationship through [page 11] confidential marriage.[4]

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[3]California Family Code § 760 defines community property as "all property, real or personal . . . acquired by a married person during the marriage while domiciled in this state." Cal. Fam. Code § 760. Section 2580 sets forth the legislative findings pertaining to legal presumptions about property acquired during marriage, and the allocation of community and separate interests in that property upon dissolution or legal separation. Id. § 2580.

[4]California's confidential marriage statute allows "an unmarried man and an unmarried woman" who have been "living together as husband and wife" an abbreviated procedure for receiving a confidential marriage license that may not be publicly disclosed except upon order of the court. Cal. Fam. Code § 500 et seq.

SDMI's argument thus applies only to heterosexual cohabitants. SDMI incorrectly reasons that because the Ordinance protects individuals in nonmarital relationships it disfavors marriage and encourages nonmarital unions. As the California Supreme Court wrote in Smith v. Fair Employment and Housing Com., "[o]ne can recognize marriage as laudable or even as favored, while still extending protection . . . to persons who do not enjoy the status." 12 Cal. 4th 1143, 1160 (1996) (prohibiting discrimination by private landlord based on marital status).

California has a legitimate interest in promoting marriage. See Garcia v. Douglas Aircraft Co. , Cal. App. 3d 890, 894 (1982). Nevertheless, California statutory and decisional law also recognizes domestic partnership and prohibits discrimination based on marital status, which indicates that laws supporting nonmarital relationships are neither inimical to State marriage laws nor contrary to State policy favoring marriage. See e.g. Marvin v. Marvin, 18 Cal. 3d 660, 684 (1974) (Obligations arising from domestic partnerships merit legal protection; Atkinson v. Kern County Housing Authority, 59 Cal. App. 3d 89,99 (1976) (invalidating regulation preventing unmarried couples from cohabiting in public housing); City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 134 (1980) (local ordinance limiting number of cohabiting unmarried adult renters unconstitutional); [page 12] Hess v. Fair Employment and Housing Com., 138 Cal. App. 3d 232, 235-36 (1982) (differential treatment of married and unmarried couples' income for tenancy qualification discriminatory).

A variety of State statutes likewise protect nonmarital relationships by prohibiting discrimination based on marital status. See e.g. Cal. Gov't Code §12921 et seq. (prohibiting discrimination in employment based on marital status); id. at §12955 et seq. (same, in housing); Cal. Ins. Code § 679.71 (same, in insurance); Cal. Pub. Util. Code § 453 (same in the provision of public utilities); Cal. Bus. & Prof. Code § 125.6

(same in providing licensed activities); Cal. Welf. & Inst. Code §§ 10000, 18907 (same, in eligibility for food stamps and welfare services); id. § 1365.5 (a) (prohibiting health care plans from refusing to contract with insureds on the basis of marital status or sexual orientation).[5]

Based on the above, the Court concludes that the Ordinance is neither contrary to State policy nor inimical to the State's marriage laws.

b. Full Occupation by the State

A State is considered impliedly to occupy a given subject area if (1) the subject matter has been so fully and completely covered by an area of general law as to indicate clearly that it has become [page 13] exclusively a matter of State concern; (2) the subject matter has been partially covered by general law couched in terms that clearly indicate that a paramount State concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the adverse effect of a local ordinance on the transient citizens of the State outweighs the possible benefit to the locality. See Los Angeles Lincoln Place Investors, Ltd v. City of Los Angeles, 54 Cal. App. 4th 53, 59 (1997); Sherwin-Williams, 4 Cal. 4th 898.

SDMI claims that the State fully occupies the subject matter of personal relationships, and asserts that the Ordinance therefore conflicts with State law. Nevertheless, SDMI does

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[5]Some California statutes have categorized "spouses" and "domestic partners" together and considered them the same. See e.g. Cal. Pen. Code §§ 11163.4, 13700 (defining domestic violence to include violence against domestic partners and cohabitants); 16 Cal. Code Regs. § 1833 (counseling spouses or domestic partners counts towards licensure hours for marriage, family, and child counselors).

not specify which State laws reflect the alleged full occupation by the State and instead argues that the Ordinance conflicts with a general State policy favoring marriage. Neither does SDMI explain how the Ordinance's requirement that City contractors provide equal benefits regulates personal relationships. Even putting these defects aside, however, SDMI's argument fails on all grounds.

First, SDMI erroneously contends that, because the State has a legitimate interest in favoring marriage, it is the State's exclusive province to regulate personal relationships. The fact that the State may selectively withhold benefits or privileges based on marital status by virtue of its legitimate interest in [page 14] marriage is not evidence that the regulation of personal relationships is exclusively a State concern.[6]

Second, as discussed above, although SDMI argues that the terms of State law indicate that State policies favoring marriage are paramount such that local regulation will not be tolerated, State law and policy recognize and protect nonmarital relationships. Neither does SDMI provide evidence that the State's interest in marriage precludes local legislation pertaining to nonmarital relationships. SDMI cites Norman v. Unemployment Insurance Appeals Bd., 34 Cal. 3d 1 (1983), for the proposition that because State policy favors marriage but lacks a "similar policy favor[ing] the maintenance of nonmarital relationships," the Ordinance may not stand. Norman did not involve local legislation, however, and is inapposite to this case.

In Norman, the California Supreme Court refused to extend the provisions of the California Unemployment Insurance Code

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[6]The cases cited by SDMI do not hold otherwise. None of the cases either involved local legislation or held that regulating benefits and privileges based on personal relationships was exclusively a State concern.

to find eligible for unemployment benefits a worker who voluntarily left her job to follow her fiancé' to another State. Id. However, the court found otherwise in a recent case, when it held that a worker who voluntarily left her employment to accompany her fiancé' to another State had shown good cause. MacGregor v. Unemployment Ins. Appeals Bd., 37 Cal. 3d 205, 213 (1998). In distinguishing its earlier holding in Norman, the court noted that although it had not found good cause in Norman based solely on a nonmarital [page 15] relationship in which marriage was not imminent, it had "explicitly declined to hold that a legal marriage is a pre-requisite for establishing good cause." Id. The court then "reaffirm[ed] the principle that the lack of a legally recognized marriage does not prevent a claimant from demonstrating that compelling familial obligations [provide] good cause for leaving employment." Id. Thus, Norman does not support the assertion that the terms of State law regarding personal relationships indicate that local action will not be tolerated.

Finally, SDMI argues that the Ordinance's effects on transient citizens outweigh the benefits to local citizens because individuals eligible for domestic partner benefits in San Francisco may not be recognized for comparable benefits outside the City. This argument is without merit. The fact that transient citizens benefit from the Ordinance only while they are residents of the City does not constitute the type of regulation or adverse impact that uniquely affects transient citizens of the State so as to outweigh the benefits to the locality.

In sum, SDMI provides no evidence that the Ordinance duplicates or contradicts State marriage or community property law, or that it conflicts with the State's interest in encouraging marriage. Neither has SDMI shown that the regulation of personal relationships by conferring benefits is an area fully occupied by State law or is the exclusive province of the State. The Court thus finds that the Ordinance does not conflict with

not reach the question of [page 16] whether the Ordinance addresses municipal affairs. See California Federal, 54 Cal. 3d at 16. The Court therefore grants summary judgment for Defendants on SDMI's claim that the Ordinance is invalid under the State Constitution or is preempted by State law.

B. City Charter

SDMI contends that the Ordinance is invalid under the City Charter because it conflicts with the State's regulation of marriage and personal relationships. As discussed above, the Court finds that the Ordinance does not conflict with State laws pertaining to marriage and community property, and that the regulation of personal relationships is not an area fully or exclusively occupied by State law. The Ordinance therefore does not violate the City Charter on these grounds.

SDMI additionally contends that the Ordinance is impermissibly extraterritorial under the terms of the City Charter because it regulates SDMI's out-of-State conduct. In ATA, this Court invalidated as impermissibly extraterritorial § 12B. 1 (d) (iv) of the Ordinance as it pertained to out-of-State conduct not related to the contract. 992 F. Supp. 1164. However, the Court found that the other provisions of the Ordinance did not address conduct that occurred wholly out-of-State and, as such, were not impermissibly extraterritorial. Accordingly, the Court finds that the City is entitled to prevail on summary judgment on SDMI's claim that the Ordinance is invalid as an improper exercise of legislative power pursuant to the San Francisco City Charter. [page 17]

III. Constitutional Challenges

SDMI claims that the Ordinance is invalid under the dormant Commerce Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution.

As discussed below, the Court's holdings in ATA are dispositive of these challenges. The Court in ATA invalidated § 12B.1 (d) (iv) as impermissibly extraterritorial in so far as it related to out-of-State conduct, and does not reconsider that ruling here. As to §§ 12B.1 (d) (i) - (iii), and §12B.1 (d) (iv) as it relates to in-State conduct, the Court finds, as it did in ATA, that these portions of the Ordinance do not violate the dormant Commerce Clause as a direct regulation or excessive burden on interstate commerce. As in ATA, SDMI's extraterritoriality argument under the Due Process Clause leads to the same result as under the dormant Commerce Clause.

A. Commerce Clause Analysis

SDMI challenges all provisions of the Ordinance under the dormant Commerce clause. Specifically, SDMI asserts (1) that the Ordinance is invalid per se because it is impermissibly extraterritorial and directly regulates interstate commerce, (2) that the City not a market participant when it acts to implement the Ordinance, and (3) that the provisions of the Ordinance are unduly burdensome under the balancing test established in Pike v. Bruce Church, Inc., 397 U. S. 137, 142 (1970).

The Supreme Court has outlined a two-tiered approach to analyzing economic regulations under the Commerce Clause. [page 18]

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-State economic interests over out-of-State interests, we have generally struck down the statute without further

> inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Healey v. Beer Institute, 491 U. S. 324, 337 n. 14 (1989) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth. , 476 U. S. 573, 579 (1986) ; Valley Bank of Nevada v. Plus System, Inc., 914 F. 2d 1186, 1189-90 (9th Cir. 1990).

ATA contains an extensive analysis of the Ordinance under the Commerce Clause. See ATA, 992 F. Supp. at 1160-65. The Court does not repeat that discussion here.

1. Per Se Invalidity: Direct Regulation or Discrimination

The dormant Commerce Clause precludes State and local laws that have the extraterritorial effect of directly regulating "commerce occurring wholly outside the boundaries of a State." Healey 491 U. S. at 336. Direct regulation occurs when a State or local law "directly affects transactions that take place across State lines or entirely outside of the State's borders." Valley, 914 F.2d at 1189-90; Edgar v. MITE Corp., 457 U. S. 624, 641 (1982).

In ATA, the Court invalidated § 12b.1 (d) (iv) as it applies to out-of-State conduct, on the grounds that it was impermissibly extraterritorial and was not shielded by the market participant exception. ATA, 992 F. Supp. at 1163-64. Therefore, SDMI's challenge to the Ordinance as to § 12b.1 (d) (iv) as it applies to out-of-State conduct is moot. [page 19]

The Court rejects the City's argument that § 12B.1 (d) (iv) is not impermissibly extraterritorial in this case. The City

contends that this case differs from the facts in ATA because, by selling services to the City, SDMI receives public funds that, in turn, support its operations nationwide, including its out-of-State operations where discrimination may occur. Although the City asserts that it has a legitimate interest in refusing to do business with companies that discriminate, even if that discrimination occurs out-of-State, see Board of Trustees v. City of Baltimore, 317 Md. 72, 562 A.2d 720 (1989); Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 155 F.3d 59 (2nd Cir. 1998), this interest does not eliminate the extraterritorial effects of §12B.1 (d) (iv) as it applies to out-of-State conduct.

As in ATA, and for the same reasons as in that case, the Court determines that the Ordinance is not otherwise impermissibly extraterritorial, except as discussed above.

SDMI argues that the Ordinance is invalid because it directly affects transactions that take place across State lines and leads to chaotic commerce.

Although transactions that the Ordinance affects may take place across State lines, the Ordinance affects those transactions only indirectly, through the agreement by out-of-State contractors to be subject to conditions the City places on contracting.

SDMI relies on National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993) to argue that the Ordinance is invalid per se because it directly affects SDMI by subjecting it to [page 20] inconsistent legislation. In NCAA, the Ninth Circuit invalidated a Nevada statute that required the bodies that regulate collegiate sports to provide certain due process protections to members, but only if the bodies had members in more than forty States. 10 F. 3d at 638. The court found that the statute directly regulated "interstate commerce and only interstate commerce" because it regulated only interstate

organization that were engaged in interstate commerce. Id. In contrast to the regulations in NCAA, the Ordinance does not target interstate organizations whose business relies on interstate commere.

SDMI also contends that under Valley Bank, the Court must consider how the Ordinance may interact with existing and potential regulatory regimes of other States and cities. However, the Ninth Circuit in Valley Bank rejected the argument that thwarting regulatory uniformity and consistency necessarily constituted direct regulation, and upheld against a Commerce Clause challenge a Nevada statute that allowed Nevada banks to set ATM fees and add local charges, regardless of restrictions imposed by ATM fees and add local charges, regardless of restrictions imposed by ATM networks. The court found that inconsistent State laws regarding ATM transaction fees could coexist without conflict, provided that each State continued to regulate its own banks. Id. at 1192.

In addition, SDMI provides no evidence that it would be subject to conflicting regulations. Although SDMI has provided the Court with a list of jurisdictions that recognize and/or provide benefits to the domestic partners of employees, it does not offer any evidence that specific regulations in other jurisdictions conflict with the Ordinance. Neither does SDMI assert that [page 21] regulations in other specific jurisdictions apply to or affect its operations. Although SDMI asserts that it would hypothetically be subject to conflicting regulations, the Court cannot conclude that such potential conflicts constitute a direct regulatory effect.

SDMI also argues that the Ordinance directly affects its operations in Ohio because it is forced to recalculate its ERISA benefit plans to determine which employees are eligible to

claim domestic partner benefits.[7] According to SDMI, benefits for all employees are provided by and administered from the Ohio office. SDMI thus contends that even when an SDMI employee is working within San Francisco City limits, it is required to conform its administrative processes in Ohio to conform with the City's law. The requirement to make administrative changes to their benefit plans is applicable to all contractors, both those in-State and out-of-State. This incidental effect is not direct regulation, nor is its practical effect to discriminate against interstate commerce.

The Court therefore concludes, as in ATA, that the Ordinance burdens interstate commerce only in that § 12B.2 (d) (iv) applies to out-of-State activities not related to a City contract. "The Ordinance does not, however, discriminate by its terms or in [page 22] practical effect between intrastate and interstate commerce: companies that do business only within California are subject to the same constraints." ATA, 992 F. Supp. at 1164. The Ordinance's effects on SDMI occur only indirectly, as a function of its agreement to be subject to the City's conditions of contracting.

The Court reaches the same result regarding the Ordinance's extraterritoriality under the Due Process Clause as it does under the Commerce Clause. The Court therefore does

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[7]SDMI also argues that the Ordinance requires that it enforce the Ordinance as to its subcontractors and thus directly regulates out-of-State conduct. As the City points out, the Ordinance does not require that subcontractors to City contractors provide domestic partner benefits. Rather, § 12B.1 (c) requires only that subcontractors abide by Chapter 12's general provisions barring discrimination (such as based on race, gender, and sexual orientation). See also HRC Rules of Procedure § IV (A). SDMI has not challenged the Ordinance's general nondiscrimination provisions.

not repeat its analysis under the Due Process Clause. See also ATA, 992 F. Supp. at 1161.

2. Market Participant Exception

SDMI asserts that if the Ordinance were vulnerable to a Commerce Clause challenge, it would not be shielded by the market participant exception because it has a regulatory effect outside of the particular market, is not focused on a single industry or contract, and has substantial extraterritorial regulatory effects. In ATA, the Court concluded that § 12B.1 (d) (iv), as it applies to out-of-State conduct, reached too far to be shielded by the market participant exception. In all other respects, however, the Court found that "when the City enters into contracts that are subject to the Ordinance, it is directly participating in the marketplace by purchasing services or leasing property." and, thus, acts as a market participant pursuant to the Ordinance. See ATA, 992 F. Supp. at 1163. The Court reaches the same conclusion in this case. [page 23]

3. Balancing Inquiry

When a statue "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike, 397 U. S. at 142.

SDMI asserts that the Ordinance fails the balancing test established in Pike because (1) the City lacks a legitimate interest in the Ordinance, (2) any legitimate interest it may have is undermined by its application of the sole source exemption, and (3) the burdens imposed on interstate commerce by the Ordinance, are excessive in relation to the local benefits. The Court disagrees.

As this Court found in ATA, the City has a legitimate interest in not indirectly supporting discriminatory practices of those with whom it does business. See ATA, 992 F. Supp. at 1164; City of Richmond v. J.A. Croson Co., 488 U. S. 469, 492 (1989) (government involvement in private race discrimination may be unconstitutional; Board of Trustees, 562 A.2d at 720 (upholding against dormant Commerce Clause challenge ordinance requiring the divestiture of city funds from companies doing business in South Africa as based on legitimate local public interest).

SDMI relies on Hinman v. Dept. of Personnel Administration, 167 Cal. App. 3d 516 (1985). In that case, a California court of appeal held that declining to provide equal benefits to an unmarried cohabitant does not constitute discrimination based on sexual orientation. SDMI argues from this that the Ordinance in case does not remedy discrimination based on sexual [page 24] orientation, and thus the City has no valid interest in the Ordinance. The finding in Hinman that a benefit package did not violate equal protection does not undermine the City's legitimate interest in preventing discrimination based on sexual orientation in context of a Pike analysis. The City has a legitimate interest in providing to domestic partners, based on benefits the City's belief that the failure to provide equal benefits in practical effect discriminates based on sexual orientation. Moreover, the City's interest in the Ordinance is not limited to preventing discrimination based on sexual orientation alone; the City has an interest in preventing discrimination based on marital status, and in ensuring pay equity between employees with spouses and those with domestic partners, independent of its aim to prevent discrimination based on sexual orientation.

Contrary to SDMI's assertion, the Ordinance does not impermissibly regulate private business or employment. As the City notes, the Ordinance instructs its contracting agencies, as the City's agents, on terms that they must include in all City

contracts. See §12 B.1 (a) and (b). Instructions to agents of government are not regulatory action. See Perkins v. Lukens Steel Co., 310 U. S. 113, 128-29 (1940) (statute requiring sellers of goods to pay employees producing goods minimum wage was not exercise of regulatory power because Congress merely instructed its [page 25] agents who granted final authority to fix the conditions of the sale).[8]

Nor does the City's sole source exemption undermine the City's legitimate interest in not supporting discriminatory business practices. See HRC Rules of Procedure § V.A (1). The sole source exemption recognizes the City's obligation to provide and obtain goods and services that would otherwise be unavailable. That the sole source exemption results in noncompliance with the Ordinance by some contractors neither undermines the legitimacy of the City's interest nor invalidates the Ordinance on constitutional grounds. "A statute is not invalid under the Constitution because it might have gone farther than it did . . . a legislature need not strike all evils at the same time." Katzenbach v. Morgan, 384 U. S. 641, 657 (1966) (internal citations and quotations omitted).

The Ordinance fails, therefore, only if the burdens it places on interstate commerce are clearly excessive in relation to the putative local benefits. SDMI presents no evidence that the burdens of implementing the Ordinance are clearly excessive in relation to the local benefits. As the Court concluded in ATA, after the invalidation of § 12B.1 (d) (iv) as applied to out-of-State conduct, the local interest in dissociating the City

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[8] SDMI relies on National Foreign Trade Council v. Baker, 1998 WL 790597, *3-4 (D. Mass.) for its contention that the burden of the Ordinance outweighs the City's uncertain interest in extraterritorial regulation. As the City points out, National Foreign Trade invalidated the ordinance at issue in that case under the Constitution's Foreign Affairs Clause, not the Commerce Clause.

from discrimination "justifies the minor burden of requiring companies to modify discriminatory benefit plans." ATA, 992 F. Supp. at [page 26] 1165. This is particularly true because contractors may comply with the Ordinance without increasing their benefit costs in theat the Ordinance allows companies to reduce or eliminate benefits as a means of complying with the Ordinance.

In sum, except as to § 12b.1 (d) (iv) with respect to out-of-State conduct, the Ordinance as applied to SDMI is not impermissibly extraterritorial, does not directly regulate, discriminate against, or unduly burden interstate commerce, and thus does not violate the dormant Commerce Clause. The Court would not reach a different result regarding extraterritoriality under the Due Process Clause. Except with respect to § 12B.1 (d) (iv) as applied to out-of-State conduct, which has already been invalidated, the City is entitled to prevail on its motion for summary judgment on SDMI's claims that the Ordinance violates the dormant Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

IV. ERISA PREEMPTION

SDMI asserts that the Ordinance is preempted by ERISA because the City is acting as a regulator, and because the Ordinance has the force and effect of State law and relates to SDMI's benefit plan, which SDMI contends is covered by ERISA. SDMI asserts that it provides two non-ERISA benefits, bereavement and family medical leave, to which it contends the Ordinance cannot be applied because SDMI meets a statutory exception to the Family Medical Leave Act (FMLA), and because a requirement that it provide bereavement leave to domestic partners is invalid under the Commerce Clause and Due Process Clause of the Fourteenth Amendment. [page 27]

The City contends that SDMI lacks standing to challenge the Ordinance based on ERISA preemption because, even if SDMI were to prevail on that claim, SDMI has declared that it will not provide its non-ERISA benefits to domestic partners of employees. See Stipulation ¶ 4 (b) and (c). Thus, SDMI would still be ineligible to receive a contract with the City, so judicial relief on its ERISA preemption claim would not redress SDMI's alleged injury. The Court agrees.

To have standing, SDMI must establish that it has suffered an actual or threatened injury that is fairly traceable to the challenged action or conduct of Defendants, and that is likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-61 (1992); San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U. S. 464, 472 (1982). SDMI has the burden of establishing these elements. Lujan, 504 U. S. at 561.

SDMI argues that it cannot be required to provide bereavement leave to domestic partners because this requirement is impermissibly extraterritorial under the Commerce and Due Process Clauses. However, the Court has already determined that the Ordinance is not impermissibly extraterritorial under the Commerce or Due Process Clauses, except as to § 12B.1 (d) (iv) as it applies to out-of-State conduct.

SDMI also argues that it is not required to provide family medical leave to its employees who would be working in the City on its proposed contract because those employees would be subject to a [page 28] statutory exception to FMLA. An employer is not required to provide leave to employees at a worksite of less than fifty employees if the total number of employees employed by the employer within seventy-five miles of the worksite is less than fifty. See 29 U. S. C. § 2611

(2) (b) (1). SDMI argues that because it would have employed four employees to work on-site and four employees to work in SDMI's local sales office, which is within seventy-five miles of San Francisco, those employees would be covered by this exception. However, SDMI also indicates that an additional three employees would have been performing contract-related work at SDMI's headquarters in Ohio, see September 11, 1998 Answer to Interrogatories, No. 24, and SDMI employees working on-site would have been based in Ohio and assigned only temporarily to the contract site. See Emblidge Decl., Exh. E, Deposition of Dana Myers, at 29. SDMI does not assert that it has fewer than fifty employees at its Ohio headquarters.

Under FMLA, if an employee has no fixed worksite, the site to which he or she is assigned as "home base" constitutes his or her worksite for the purposes of FMLA.

See 29 C.F.R. § 825.111 (a) (2). Thus, SDMI could not deny employees leave under FMLA simply because they were temporarily assigned to the San Francisco area.

Because SDMI declares that it will not make even non-ERISA benefits available to domestic partners of its employees working on a City contract, even a favorable ruling from this Court on SDMI's ERISA preemption claim would not redress SDMI's alleged injury. SDMI would still be ineligible to be awarded the City contract. SDMI thus fails to meet its burden of showing that it has a standing [page 29] to assert its ERISA preemption claim, and the Court does not consider it.

CONCLUSION

For the foregoing reasons, SDMI's motion for summary judgment (Docket No. 27) is DENIED as to all claims. The Court GRANTS the City's cross-motion for summary judgment (Docket No. 31) as to all of SDMI's claims. The Court notes that although it grants the City's motion for

summary judgment in full, it declines to reconsider its decision in ATA that § 12B.1 (d) (iv) is impermissibly extraterritorial as applied to out-of-State conduct.

/s/Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Date: May 27, 1999

Copies mailed to counsel
as noted on the following page

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-01763 CW
AIR TRANSPORT ASSOCIATION OF AMERICA;
AIRLINE INDUSTRIAL RELATIONS CONFERENCE;
FEDERAL EXPRESS CORPORATION;
UNITED AIRLINES, INC.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO; SAN
FRANCISCO HUMAN RIGHTS COMMISSION;
SAN FRANCISCO AIRPORTS COMMISSION,

Defendants.

No. C 97-04463 CW
S.D. MYERS, INC.,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, and SAN
FRANCISCO HUMAN RIGHTS COMMISSION,

Defendants

ORDER RESOLVING PREEMPTION ISSUE
ON REMAND

These cases are on remand from the Ninth Circuit to resolve the issue whether § 299.6 of the California Family Code preempts or otherwise invalidates the San Francisco Domestic Partner Benefits [page 2] Ordinance, San Francisco Administrative Code Chapters 12B and 12C (the Ordinance).

Plaintiffs Air Transport Association of America (ATA), Airline Industrial Relations Conference (AIRCON), United Airlines, Inc. (United), and Federal Express Corporation (FedEx), and Plaintiff S.D. Myers, Inc. (collectively, Plaintiffs) argue that the Ordinance is preempted by § 299.6. Defendants City and County of San Francisco (the City) and the San Francisco Human Rights Commission (HRC) (collectively, Defendants), maintain that § 299.6 does not preempt the Ordinance. The matter was submitted on the papers.

This Court finds that § 299.6 of the California Family Code does not preempt or otherwise invalidate any aspect of the Ordinance.

BACKGROUND

The provisions of the Ordinance and the implementing regulations are discussed in detail in this Court's April 10, 1998 Order in Air Transport Association of America v. City and County of San Francisco, 992 F.Supp. 1149 (N.D. Cal. 1998). The Court reviews those provisions briefly, and only partially, in this order.

The Ordinance requires as a term of contracting with the City that every person or entity that enters into or amends a contract or lease with the City not discriminate during the term of the lease or contract in the provision of benefits "between employees with domestic partners and employees with spouses . . . where the domestic partnership has been registered with the governmental [page 3] entity." See S.F. Admin. Code §§ 12B.1(b) and 12B.2(b). The Ordinance aims to fulfill in

economic terms a promise long required in City contracts: that parties doing business with the City not discriminate based on sexual orientation or marital status. The Ordinance applies to any employee benefits but includes a non-exclusive illustrative list that includes bereavement leave, family medical leave, health benefits, membership and membership discounts, moving expenses, pension and retirement benefits or travel benefits. Id. At §§12B.1(b), 12B.2(b).

In S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461 (9th Cir. 2001), the Ninth Circuit affirmed this Court's May 27, 1999 Order granting summary judgment to Defendants and upholding the Ordinance. In Air Transport Association v. City and County of San Francisco, 266 F.3d 1064 (9th Cir. 2001), the Ninth Circuit affirmed this Court's April 10, 1998 order on cross-motions for summary judgment, which upheld the Ordinance in some respects and found it preempted in other respects. In both of these cases Plaintiffs raised the issue of preemption by California Family Code § 299.6 for the first time on appeal, so the Ninth Circuit remanded both cases to this Court to decide this limited issue.

California Family Code § 299.6 is part of recently enacted domestic partner legislation which provides for a State-side domestic partner registry and various rights and responsibilities for registered domestic partners. See Cal. Family Code § 297 et seq. Section 299.6 (a) states: "Any local ordinance or law that provides for the creation of a 'domestic partnership' shall be preempted on and after July 1, 2000, except as provided in [page 4] subdivision (c)." Cal. Family Code § 299.6 (a). Section 299.6 (b) states:

> Domestic partnerships created under any domestic partnership ordinance or law before July 1, 2000, shall remain valid. On and after July 1, 2000, domestic partnerships previously established under a local ordinance or law shall be governed by this

> division and the rights and duties of the partners shall be those set out in this division, except as provided by subdivision (c) . . . .

Id. § 299.61 (b).

Section 299.6 (c) provides:

> Any local jurisdiction may retain or adopt ordinances, policies, or laws that offer rights within that jurisdiction to domestic partners as defined by the local jurisdiction's ordinances, policies, or laws, or that impose duties upon third parties regarding domestic partners as defined by Section 297 or as more broadly defined by the local jurisdiction's ordinances, policies, or laws, that are in addition to the rights and duties set out in this division, and the local rights may be conditioned upon the agreement of the domestic partners to assume the additional obligations set forth in this division.

Id. § 299.6 (c). Section 299.5 (a) expresses the intent of the California legislature, stating: "The provisions relating to domestic partners provided in this division and any provision of law specifically referring to domestic partners shall not diminish any right under any other provision of law." Id. § 299.5 (a).

DISCUSSION

I. Legal Standard

Under Article XI, § 7 of the California Constitution, a "county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7. If [page 5] otherwise valid local legislation conflicts with State law, it is

preempted by State law and is void. See Sherwin-Williams Co. v. City of Los Angeles, 16 Cal. Rptr. 2d 215, 217 (1993). Local legislation conflicts with State law if it "duplicates, contradicts, or enters an area fully occupied by general law." Id. (citations omitted). Legislation duplicates State law if it is coextensive therewith, contradicts State law if it is inimical thereto, and enters an area fully occupied by general State law if the Legislature explicitly or impliedly has manifested an intent to occupy the area. Id.

Article XI, § 5 (a) of the California Constitution exempts from preemption by State law charter city provisions that address purely "municipal affairs." Under § 5 (a), a charter city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Id.

When there is a putative conflict between a State statute and a charter city measure, the threshold inquiry is whether there is a genuine conflict between local legislation and State law. See Cal. Fed. Savs. & Loan Ass'n v. City of Los Angeles, 283 Cal. Rptr. 569, 578 (1991). If local legislation conflicts, then the Court must determine whether the issue is a municipal affair or whether it implicates a Statewide concern. Id. "If it does not [conflict], a choice between the conclusions 'municipal affair' and 'statewide concern' is not required." Id. As the court explained in California Federal, "To the extent difficult choices between [page 6] competing claims on municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." Id.

II. Plaintiffs' Claim that the Ordinance is Preempted by § 299.6

Section 299.6 (a) provides that any "local ordinance or law that provides for the creation of a 'domestic partnership' shall be preempted . . . ." The Ordinance is not a law that provides for the creation of a domestic partnership, it is a contracting provision that states that all entities that contract with the City of San Francisco must provide benefits to domestic partners of their employees in a nondiscriminatory manner. The Ordinance does not create domestic partnerships or purport to regulate domestic partnerships. It is simply a nondiscrimination provision that operates to benefit those who are registered domestic partners. Therefore, under the plain language of § 299.6, the ordinance is not preempted, because it does not "provide for the creation of a 'domestic partnership.'"

Further, even if § 299.6 could be read to apply to the Ordinance, the Ordinance is expressly excluded from § 299.6 (a)'s preemptive reach in § 299.6 (c). Plaintiffs argue that § 299.6 (c), which provides an exception from preemption for "ordinances, policies or laws that offer rights within that jurisdiction to domestic partners . . ., or that impose duties upon third parties regarding domestic partners . . . that are in addition to the rights and duties set out in this division," fails to protect the Ordinance because the Ordinance does not only operate within San Francisco's jurisdiction. However, Plaintiffs' reading of § 299.6 (c) is mistaken. Section 299.6 (c) provides that any jurisdiction may retain or adopt ordinances (1) "that offer rights within that jurisdiction," or (2) "that impose duties upon third parties regarding domestic partners . . . that are in addition to the [page 7] rights and duties set out in this division." The portion of § 299.6 (c) that is limited to ordinances that operate "within that jurisdiction" only applies to the first clause, and does not affect the second clause, which plainly applies to the Ordinance. The Ordinance is, as the second clause allows, a law that imposes duties upon third

parties in addition to the rights and duties set out in California Family Code § 297 et seq. For this additional reason, § 299.6 (c) provides an exception from preemption which applies to the Ordinance. [page 8]

CONCLUSION

For the forgoing reasons, the Ordinance is not preempted or otherwise invalidated by § 299.6 of the California Family Code.

IT IS SO ORDERED.

Dated: June 24, 2002

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

APPENDIX D

336 F.3d 1174

United States Court of Appeals,
Ninth Circuit.

S.D. MYERS, INC., Plaintiff-Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO; San Francisco Human Rights Commission, Defendants-Appellees.

No. 02-16480.

Argued and Submitted March 13, 2003.
Filed July 29, 2003.

Before GOODWIN, TASHIMA, and WARDLAW, Circuit Judges.

OPINION

GOODWIN, Senior Circuit Judge.

S.D. Myers, Inc. again challenges San Francisco's Nondiscrimination in Contracts Ordinance (the "Ordinance"), S.F. Admin. Code Ch. 12B, a measure that requires all city contractors to provide equal benefits to their employees, regardless of marital or domestic partner status. This is not the first time Myers has asked us to strike down the Ordinance. In *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir.2001) *(Myers I)*, we upheld the Ordinance as consistent with state law, federal law, and the U.S. Constitution. We once again uphold the Ordinance, this time against a challenge of preemption by California Family Code §§ 297-299.6 (the "Registration Statute"), a recently-enacted

state statute that governs the creation and registration of domestic partnerships.

I. Background

Myers I details the relevant facts and we recite them only as necessary to understand the nature of this appeal. In 1997, Myers, an Ohio-based corporation, submitted the lowest bid to service electrical transformers owned by the City of San Francisco (the "City") but located outside of city boundaries in Northern California. *See Myers I*, 253 F.3d at 465. To secure the service contract, the City required Myers to certify its willingness to comply with the Ordinance. *See id.* at 466. Myers refused to comply because the Ordinance was contrary to the company's "religious and moral principles." *Id.* As a result, the City rejected Myers's bid.

II. Analysis

We are called to decide whether the Registration Statute conflicts with, and therefore preempts, the Ordinance. According to the California Constitution, "[a] ***1177** county or city may make or enforce within its limits all local, police, sanitary, and other ordinance and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. "A conflict exists [only] if the local legislation [1] duplicates, [2] contradicts, or [3] enters an area fully occupied by general law, either expressly or by legislative implication." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897, 16 Cal.Rptr.2d 215, 844 P.2d 534 (1993) (internal quotation marks omitted).

In performing this analysis, we are mindful of California's policy against preemption: "To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in

fact a genuine one, unresolvable short of choosing between one enactment and the other." *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 54 Cal.3d 1, 16-17, 283 Cal.Rptr. 569, 812 P.2d 916 (1991).

A. Does the ordinance duplicate state law?

"Local legislation is duplicative of general law when it is coextensive therewith." *Sherwin-Williams Co.*, 4 Cal.4th at 897-98, 16 Cal.Rptr.2d 215, 844 P.2d 534 (internal quotation marks omitted); *see also Cohen v. Bd. of Supervisors*, 40 Cal.3d 277, 292, 219 Cal.Rptr. 467, 707 P.2d 840 (1985) (local ordinance prohibited escorts from engaging in any and all criminal conduct; court found preemption because the ordinance was coextensive with state criminal law). While the Ordinance and Registration Statute both concern domestic partnerships, they regulate entirely distinct matters.

The Ordinance is San Francisco's "concrete" attempt at abiding by its pledge "not to do business with entities that discriminate on the basis of sexual orientation." *Myers I*, 253 F.3d at 465. The Ordinance provides:

> All contracting agencies of the City ... shall include in all contracts and property contracts ... a provision obligating the contractor not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, *domestic partner status*, marital status, disability, or Acquired Immune Deficiency Syndrome or HIV status (AIDS/ HIV status) ... against any employee of ... such contractor and shall require such contractor to include a similar provision in all subcontracts executed or amended thereunder.

S.F. Admin. Code, § 12B.1(a) (emphasis added). It further provides:

> No contracting agency of the City ... shall execute or amend any contract or property contract with any contractor that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any benefits other than bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to State or local law authorizing such registration....
>
> *Id.* § 12B.1(b).

As these two subsections illustrate, the Ordinance is an anti-discrimination measure the City imposes on all entities that ***1178** choose to contract with it. Under the Ordinance, if an entity receives the benefit of contracting with the City, it must refrain from discrimination along a number of axes, including domestic partner status, when providing benefits to employees and their spouses/partners.

The Registration Statute, on the other hand, governs the creation and registration of domestic partnerships by imposing detailed requirements and procedures that two individuals must follow before obtaining recognition of their union by the State of California. For example, it requires that both individuals entering into a domestic partnership: "have a common residence," "agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership," "not [be] related by blood in a way that would prevent them from being married to each other in this state," "are at least 18 years of age," and are either "members of the same sex" or "over the age of 62." Cal. Fam.Code § 297. It also describes the fees and processing materials necessary to

file a notice of domestic partnership with the state, *see id.* § 298, and the conditions under which a domestic partnership ceases to exist, *see id.* § 299. The Registration Statute neither addresses discrimination on the basis of domestic partner status, nor regulates the provision of benefits to the domestic partners of employees. Furthermore, it does not impose any additional obligations on an employer once an employee registers a domestic partnership. [FN1] *See also* Senate Judiciary Comm. Rep., AB26, Reg. Sess. (Cal.1999) ("This bill would define a domestic partnership and provide for its registration and termination in the state.").

> FN1. The statute does provide that a "third party who suffers a loss as a result of failure by the domestic partner to send[a notice of partnership termination] shall be entitled to seek recovery from the partner who was obligated to send it for any actual loss resulting thereby." Cal. Fam.Code § 299(4)(c). This, however, is not an obligation on the employer to provide any additional benefit. Rather it creates a duty on the individual who has benefitted from his/her membership in a domestic partnership to notify third parties when that partnership ceases to exist.

As the district court correctly recognized, the two measures regulate distinct subject matters and therefore are not duplicative.

B. Does the ordinance contradict state law?

"[L]ocal legislation is contradictory to general law when it is inimical thereto." *Sherwin-Williams*, 4 Cal.4th at 898, 16 Cal.Rptr.2d 215, 844 P.2d 534 (citing *In re Portnoy*, 21 Cal.2d 237, 240, 131 P.2d 1 (1942) (finding contradiction where local legislation established a lower maximum speed limit for motor vehicles as compared to the higher speed limit fixed by state law)). The Ordinance does not expressly contradict any

provision of the Statute. It is an anti-discrimination measure directed at contractors seeking business from the City whereas the Registration Statute is a set of requirements and procedures directed at individuals seeking official recognition of their domestic partnership. The measures regulate wholly distinct subject matters and do not contradict each other.

C. Does the Ordinance enter an area fully occupied by state law, either expressly or impliedly?

Even if the Ordinance does not duplicate or contradict the Statute, it is still invalid if it "enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so." ***1179** *Id.*, 4 Cal.4th at 898, 16 Cal.Rptr.2d 215, 844 P.2d 534 (internal citations and quotation marks omitted). Myers contends that the California Legislature has expressly *and* impliedly manifested its intent to occupy fully the area of domestic partnership regulation.

In assessing Myers's argument, the following rules of California statutory construction apply: "Of primary importance 'the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " *San Diego Union v. City Council*, 146 Cal.App.3d 947, 953-954, 196 Cal.Rptr. 45 (1983) (quoting *Select Base Materials, Inc. v. Bd. of Equalization*, 51 Cal.2d 640, 645, 335 P.2d 672 (1959)). "The provision under scrutiny must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which, upon application, will result in wise policy rather than mischief or absurdity." *Id.* at 954, 196 Cal.Rptr. 45 (citations omitted). "The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous

construction." *Id.* (quoting *Cossack v. City of Los Angeles*, 11 Cal.3d 726, 733, 114 Cal.Rptr. 460, 523 P.2d 260 (1974)).

1. Express Full Occupation

The Registration Statute provides:

> Any local jurisdiction may retain or adopt ordinances, policies, or laws that offer rights within that jurisdiction to domestic partners as defined by Section 297 or as more broadly defined by the local jurisdiction's ordinances, policies, or laws, or that impose duties upon third parties regarding domestic partners as defined by Section 297 or as more broadly defined by the local jurisdiction's ordinances, policies, or laws, that are in addition to the rights and duties set out in this division....

Cal. Fam.Code § 299.6(c).

This provision, according to Myers, represents an express Legislative intent to occupy fully the area of domestic partnership regulation in California. Under this interpretation, § 299.6(c) allows a municipality to offer domestic partnership rights and impose duties on third parties *only* within the municipality's boundaries. Any domestic partnership ordinance that regulates outside of local boundaries is subject to preemption by the Registration Statute. The City, on the other hand, argues that § 299.6(c) allows a municipality to offer rights within its boundaries and to impose duties on third parties within *and* outside of its boundaries. In short, the parties ask us to choose between one of two interpretations of § 299.6(c).

We agree with the City's interpretation of the statute for two reasons. First, in *Myers I*, we specifically held that the Ordinance is not an unconstitutional attempt at extraterritorial regulation. *See Myers I*, 253 F.3d at 474 ("[U]nder California

law, the Ordinance is an exercise of the City's contracting power.") Thus, "the City is not acting extraterritorially when it uses that power in conjunction with its proprietary power over City property." *Id.; see also Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir.1989) (a city may exercise proprietary powers with respect to property it owns even if that property lies outside the city's corporate boundaries).

Second, a review of the limited legislative history does not reveal support for Myers's position. Myers has provided no compelling evidence to show that the Legislature intended to occupy fully the entire arena of domestic partnership regulation. Nor does the legislative history suggest that the Legislature intended to preempt ***1180** any local ordinance that reached outside of local boundaries. The legislative history provides little relevant guidance and we decline to take the drastic step of striking down the Ordinance.

2. Implied Full Occupation

Even if the Legislature has not manifested an express intention to occupy fully all matters relating to domestic partnerships, we still must consider whether it has done so implicitly. The California Supreme Court has identified several "indicia of intent" to determine whether the Legislature has fully occupied a particular area of regulation by implication, including:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;
> (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action;

Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles, 54 Cal.App.4th 53, 59-60, 62 Cal.Rptr.2d 600 (1997) (quoting *Sherwin-Williams Co.*, 4 Cal.4th at 897-98, 16 Cal.Rptr.2d 215, 844 P.2d 534). [FN2]

> FN2. A third indicium of intent is that "the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit of the locality." *Los Angeles Lincoln Place Investors*, 54 Cal.App.4th at 60, 62 Cal.Rptr.2d 600. Since the facts of this case do not implicate the interest of transient citizens, no further analysis is necessary on this point.

Neither indicia is present in this case. A municipality's ability to contract exclusively with businesses that do not discriminate on the basis of domestic partner status has not been "fully," "completely," or even "partially" covered by state law. The Legislature has been silent on the subject of municipal contracting choices in this context; and Myers does not cite to any statute that covers the area. Further, an overall reading of §§ 297- 299.6 does not reveal legislative intent for the statute to serve as anything beyond a set of requirements and procedures for establishing domestic partnerships officially recognized by the State of California. The Registration Statute is carefully worded to describe the requirements for a domestic partnership, the processes involved in filing a domestic partnership notice, and the procedures for terminating a domestic partnership. It is difficult to see in this case which of these "terms indicate clearly that a paramount state concern will not tolerate further or additional local action." *Los Angeles Lincoln Place Investors, Ltd.*, 54 Cal.App.4th at 59- 60, 62 Cal.Rptr.2d 600.

III. Conclusion

We hold that Cal. Fam.Code §§ 297-299.6 and S.F. Admin. Code Chap. 12B do not conflict and therefore, the former does not preempt the latter. Because we uphold the validity of the Ordinance on this ground, we need not reach the issue of whether it regulates a purely municipal affair.

AFFIRMED.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 26 2003

S.D. MYERS, INC.

Plaintiff - Appellant

v. ORDER

CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Defendant - Appellees.

_____/

Before: GOODWIN, TASHIMA and WARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing.

Judges Tashima and Wardlaw have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX F

Minority, Woman, and Local Business Enterprise - SF Administrative Code Chapter 12B

SEC. 12B.1. ALL CONTRACTS AND PROPERTY CONTRACTS TO INCLUDE NONDISCRIMINATION PROVISIONS; DEFINITIONS.

(a) All contracting agencies of the City, or any department thereof, acting for or on behalf of the City and County, shall include in all contracts and property contracts hereinafter executed or amended in any manner or as to any portion thereof, a provision obligating the contractor not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), weight, height, association with members of classes protected under this chapter or in retaliation for opposition to any practices forbidden under this chapter against any employee of, any City employee working with, or applicant for employment with such contractor and shall require such contractor to include a similar provision in all subcontracts executed or amended thereunder.

(b) No contracting agency of the City, or any department thereof, acting for or on behalf of the City and County, shall execute or amend any contract or property contract with any contractor that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any benefits other than bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits between employees with domestic partners and employees with

spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to State or local law authorizing such registration, subject to the following conditions. In the event that the contractor's actual cost of providing a certain benefit for the domestic partner of an employee exceeds that of providing it for the spouse of an employee, or the contractor's actual cost of providing a certain benefit for the spouse of an employee exceeds that of providing it for the domestic partner of an employee, the contractor shall not be deemed to discriminate in the provision of benefits if the contractor conditions providing such benefit upon the employee agreeing to pay the excess costs. In addition, in the event a contractor is unable to provide a certain benefit, despite taking reasonable measures to do so, the contractor [page 2] shall not be deemed to discriminate in the provision of benefits if the contractor provides the employee with a cash equivalent.

(c) Definitions. As used in this Chapter the following words and phrases shall have the meanings indicated herein:

"Age" shall mean the age of any employee or applicant for employment who has attained the age of 40 years and has not attained the age of 65 years. For the purposes of this Chapter, discrimination because of age shall mean dismissal from employment of, or refusal to employ or rehire any person because of his or her age, if such person has attained the age of 40 years and has not attained the age of 65 years, if the person is physically able and mentally competent to perform the services required. Age limitations of apprenticeship programs in which the State or its political subdivisions participate shall not be considered discriminatory within the meaning of this Chapter.

"Amend" shall mean to substantively change the terms of a pre-existing contract, and shall not include amendments to decrease the scope of work or the amount to be paid under a contract.

Construction change orders shall not be construed as contract amendments for the purposes of this Chapter.

"City" shall mean the City and County of San Francisco.

"Commission" shall mean the Human Rights Commission of the City and County of San Francisco.

"Contract" shall mean an agreement for public works or improvements to be performed, or for goods or services to be purchased or grants to be provided, at the expense of the City and County or to be paid out of moneys deposited in the treasury or out of trust moneys under the control or collected by the City and County, and does not include property contracts, agreements entered into after June 1, 1997 pursuant to settlement of legal proceedings, contracts for urgent litigation expenses, or contracts for a cumulative amount of $5,000 or less per vendor in each fiscal year.

"Contractor" means any person or persons, firm, partnership, corporation, or combination thereof, who enters into a contract or property contract with a department head or officer empowered by law to enter into contracts or property contracts on the part of the City and County.

"Director" shall mean the Director of the Human Rights Commission.

"Disability" shall mean a physical or mental impairment which substantially limits one or more major life activities, or a record of such an impairment.

"Domestic partner" shall mean any person who has a currently registered domestic partnership with a governmental body pursuant to state or local law authorizing such registration.

"Gender identity" shall mean a person's various individual attributes as they are understood to be masculine and/or feminine.

"Property contract" shall mean a written agreement for the exclusive use or occupancy of real property for a term exceeding 29 days in any calendar year, whether by singular or cumulative instrument, (I) for the operation or use by others of real property owned or controlled by the City for the operation of a business, social, or other establishment or organization, including leases, concessions, franchises and easements, or (ii) for the City's use or occupancy of real property owned by others, including leases, concessions, franchises and [page 3] easements. For the purposes of this Chapter, "exclusive use" means the right to use or occupy real property to the exclusion of others, other than the rights reserved by the fee owner. "Property contract" shall not include a revocable at-will use or encroachment permit for the use of or encroachment on City property regardless of the ultimate duration of such permit, except that "property contract" shall include such permits granted to a private entity for the use of City property for the purpose of a for-profit activity. "Property contract" shall also not include street excavation, street construction or street use permits, agreements for the use of City right-of-way where a contracting utility has the power of eminent domain, or agreements governing the use of City property which constitutes a public forum for activities that are primarily for the purpose of espousing or advocating causes or ideas and that are generally recognized as protected by the First Amendment to the U.S. Constitution, or which are primarily recreational in nature.

"Qualified disabled employee" shall mean a person able to perform the essential functions of a job with reasonable accommodation.

"Sex" shall mean the character of being male or female.

"Sexual orientation" shall mean the status of being lesbian, gay, bisexual or heterosexual.

"Subcontract" shall mean an agreement to (i) provide goods and/or services, including construction labor, materials or equipment, to a contractor, if such goods or services are procured or used in the fulfillment of the contractor's obligations arising from a contract with the City, or (ii) to transfer the right to occupy or use all or a portion of a real property interest subject to a property contract to a subcontractor and pursuant to which the contractor remains obligated under the property contract.

"Subcontractor" means any person or persons, firm, partnership, corporation or any combination thereof, who enters into a subcontract with a contractor. Such term shall include any person or entity who enters into an agreement with any subcontractor for the performance of 10 percent or more of any subcontract.

(d) The requirements of this Chapter shall apply to (i) any of a contractor's operations within San Francisco; (ii) a contractor's operations on real property outside of San Francisco owned by the City or which the City has a right to occupy if the contractor's presence at that location is connected to a contract or property contract with the City; (iii) where the work is being performed by a contractor for the City within the United States; and (iv) any of a contractor's operations elsewhere within the United States.

SEC. 12B.2. NONDISCRIMINATION PROVISIONS.

Every contract and property contract for or on behalf of the City shall incorporate by reference and require the contractor to comply with the provisions of Section 12B.2. In addition, all contractors must incorporate by reference in all subcontracts and require subcontractors to comply with the requirements set

forth in Sections 12B.2(a) and 12B.2(c) through 12B.2(k), and failure to do so shall constitute a material breach of contract.

In the performance of a contract the contractor agrees as follows:

[page 4] (a) The contractor or subcontractor will not discriminate against any employee, City and County employee working with such contractor or subcontractor, or applicant for employment with such contractor or subcontractor on the basis of the fact or perception of that person's race, color, religion, ancestry, national origin, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or AIDS/HIV status, weight, height, or association with members of classes protected under this chapter or in retaliation for opposition to any practices forbidden under this chapter. Discrimination on the basis of sex includes sexual harassment as defined in Section 16.9-25(b) of this Code. The contractor or subcontractor will take action to ensure that applicants are employed, and that employees are treated equally during employment, without regard to the fact or perception of their race, color, creed, religion, ancestry, national origin, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, weight, height, or AIDS/HIV status. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training, including apprenticeship. Nothing in this Chapter shall require or prohibit the establishment of new classifications of employees in any given craft. The provisions of this Section with respect to age shall not apply to (l) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operations of the terms or conditions of any bona fide retirement or pension plan which has the effect of a minimum service requirement, and (3) operation of the terms or conditions of any bona fide group or

insurance plan. The contractor or subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in such form and content as shall be furnished or approved by the awarding authority setting forth the provisions of this Section.

(b) The prime contractor shall state that the prime contractor does not, and will not during the term of the contract discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any benefits other than bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to State or local law authorizing such registration, subject to the following conditions. In the event that the contractor's actual cost of providing a certain benefit for the domestic partner of an employee exceeds that of providing it for the spouse of an employee, or the contractor's actual cost of providing a certain benefit for the spouse of an employee exceeds that of providing it for the domestic partner of an employee, the contractor shall not be deemed to discriminate in the provision of benefits if the contractor conditions providing such benefit upon the employee agreeing to pay the excess costs. In addition, in the event a contractor is unable to provide a certain benefit, despite taking reasonable measures to do so, the contractor shall not be deemed to discriminate in the provision of benefits if the contractor provides the employee with a cash equivalent. The Director shall be the final arbiter of a contractor's or property contractor's compliance or substantial compliance with this Chapter and the Director's determination shall not be appealable to the Commission. Contractors shall treat as

confidential to the maximum extent allowed by law or the requirements of contractor's insurance provider any request by an employee or applicant for employment for domestic partner or spousal benefits or any documentation of eligibility for domestic partner or spousal benefits submitted by an employee or applicant for employment.

In adopting this Section 12B.2(b), the intent of the Board of Supervisors is to equalize to the maximum extent legally permitted the total compensation between similarly situated employees with spouses and employees with domestic partners. [page 5]

In particular, consistent with the severability clause set forth in Section 12B.6 below, the Board of Supervisors intends that if a court or agency of competent jurisdiction finds that a State or federal law, rule or regulation invalidates (1) the application of this Section to any business, person, type of compensation or benefit, or location; or (2) any other requirement of this Section, then the court or agency should sever the invalid clause and leave in effect the remainder of this Section.

(c) The contractor or subcontractor shall provide reasonable accommodation for qualified disabled applicants for employment and for qualified disabled employees. Said contractor or subcontractor need not provide reasonable accommodation if such would present an undue hardship. An undue hardship may include but not be limited to more than a de minimus cost, violation of the seniority rights of other co-workers as established by a bona fide seniority system, or a health or safety risk to the employee or co-employees. The burden of establishing an undue hardship rests on the employer.

(d) The contractor or subcontractor will in all solicitations or advertisements for employees placed by or on his or her behalf, state that qualified applicants will receive consideration for employment without regard to the fact or perception of their

race, creed, religion, color, ancestry, national origin, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, weight, height or AIDS/HIV status.

(e) The contractor or subcontractor will send to each labor union or representative of workers with which he or she has a collective bargaining agreement or other agreement or understanding, a notice, in such form and content as shall be furnished or approved by the awarding authority, advising the said labor union or workers' representative of the contractor's or subcontractor's commitments under this Section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(f) The contractor or subcontractor will permit access to its records of employment, employment advertisements, application forms, and other pertinent data and records by the Commission, the City's awarding authority or the Fair Employment and Housing Commission, for the purposes of investigation to ascertain compliance with the nondiscrimination provisions of this Chapter, and upon request shall provide evidence that the contractor has complied or will comply with the nondiscrimination provisions of this Chapter.

(g) A contractor or subcontractor shall be deemed to have breached the nondiscrimination provisions of this Chapter upon:

(1) A finding by the Director or such other official who may be designated by the Commission, that the contractor or subcontractor has willfully violated such nondiscrimination provisions; or

(2) A finding by the California Fair Employment and Housing Commission that a contractor or subcontractor has violated any provision of the California Fair Employment and Housing Act or the nondiscrimination provisions of this Chapter, provided

that the California Fair Employment and Housing Commission has issued a final order pursuant to Section 12970 of the Government Code, or has obtained a judgment and order enforcing the final order pursuant to Section 12973 of the Government Code; provided further, that for the purposes of these provisions, an order or injunction shall not be considered final during the period within which (1) appeal may be taken, or (2) the same has been stayed by order of court, or (3) further proceedings for vacation, reversal or modification are in progress before a competent administrative or judicial tribunal. [page 6]

(3) Upon such finding by the Director or other official designated by the Commission, or the California Fair Employment and Housing Commission, the awarding authority shall notify the contractor or subcontractor that unless the contractor or subcontractor demonstrates to the satisfaction of the Director or other official designated by the Commission, within such reasonable period as the Commission shall determine, that the violation has been corrected, action will be taken as set forth in Subparagraphs (h) and (I) hereof.

(4) The Commission shall, within 10 days of the date of issuance of any finding by the Director or other official designated by the Commission for the enforcement of this Chapter, mail to any person or persons affected by said finding, a copy of said finding, together with written notice of the right to appeal such finding. Notice of appeal must be filed in writing with the Chairperson of the Commission within 20 days of the date of mailing said copy and notice.

(5) For purpose of appeal proceedings under this Section, a quorum shall consist of eight members of the Commission. The vote of the majority of the full Commission shall be necessary to affirm, reverse or modify such decisions, order or other action rendered hereunder. Should a member of the Commission be designated under Section 12B.2(g)(1) of this

Chapter, that Commissioner may not participate in an appeal under this Section except as a witness.

(6) The presiding officer of the Commission shall have the power to administer oaths to witnesses in appeals before the Commission under this Section. In the event that any person shall fail or refuse to appear as a witness in any such proceeding after being requested to do so, and if it shall appear to the Commission that his or her testimony, or books, records, documents or other things under his or her control are material and relevant as evidence in the matter under consideration by the Commission in the proceeding, the presiding officer of the Commission may subpoena such person, requiring his or her presence at the proceeding, and requiring him or her to bring such books, records, documents or other things under his or her control.

(7) All appeals to the Commission shall be open to the public. Records and minutes shall be kept of such proceedings and shall be open to public inspection. Upon reaching a decision in any appeal, the Commission shall give written notice thereof to the Director or other official designated by the Commission, and the appellant or appellants. The decision of the Commission shall be final unless within 15 days of the filing and service of written notice thereof appropriate legal proceedings are filed in a court of competent jurisdiction by any party to the contract, property contract or subcontract.

(8) If any contractor or subcontractor shall fail to appear at an appeal proceeding of the Commission after having been given written notice to appear, such failure to appear shall be grounds for termination of the contract, property contract or subcontract and such contractor or subcontractor shall be deemed to have forfeited all rights, benefits and privileges thereunder.

(9) The Commission shall promulgate rules and regulations for the implementation of the nondiscrimination provisions of this Chapter.

(h) The awarding authority may deduct from the amount payable to the contractor or subcontractor by the City under any contract or property contract subject to this Chapter, or may impose upon the contractor or subcontractor, a penalty of $50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Chapter. In addition to any other penalties provided for the violation of the nondiscrimination provisions of this Chapter or for the failure of any contractor or subcontractor to abide by the rules and regulations of [page 7] the Commission, the contract, property contract or subcontract may be terminated or suspended, in whole or in part, by the awarding authority upon the basis of a finding as set forth in Section 12B.2(g) that the contractor has discriminated contrary to the provisions of this Chapter, and all moneys due or to become due hereunder may be forfeited to, and retained by, the City.

(i) A breach of the nondiscrimination provisions in the performance of a contract, property contract or subcontract shall be deemed by the City to be material breach of contract and the basis for determination by the awarding authority that the contractor or subcontractor is an irresponsible bidder as to all future contracts or property contracts for which such contractor or subcontractor may submit bids. Such contractor or subcontractor shall not for a period of up to two years thereafter, or until it shall establish and carry out a program in conformity with the nondiscrimination provisions of this Chapter, be allowed to act as a contractor or subcontractor under any contract or property contract.

(j) Nothing contained in this Chapter shall be construed in any manner so as to prevent the City from pursuing any other

remedies that may be available at law, equity or under any contract or property contract.

(k) The contractor or subcontractor will meet the following standards for compliance:

(1) If the contractor or subcontractor has been held to be an irresponsible bidder under Section 12B.2(I) hereof, the contractor or subcontractor shall furnish evidence that it has established and is carrying out a program in conformity with the nondiscrimination provisions of this Chapter.

(2) The contractor or subcontractor may be required to file with the Commission a basic compliance report, which may be a copy of the federal EEO-1, or a more detailed report as determined by the Commission. Willful false statements made in such reports shall be punishable as provided by law. No contractor or subcontractor shall be held in noncompliance for not filing such a report with the Commission unless it has been specifically required to do so in writing by the Commission.

(3) Personally, or through its representatives, the contractor or subcontractor shall, through negotiations with the unions with whom it has collective bargaining or other agreements requiring the contractor or subcontractor to obtain or clear its employees through the union, or when the contractor or subcontractor otherwise uses a union as an employment resource, attempt to develop an agreement which will:

(A) Define and outline responsibilities for nondiscrimination in hiring, referral, upgrading and training;

(B) Otherwise implement a nondiscrimination program in terms of the unions' specific areas of skill and geography, such as an apprenticeship program, to the end that minority workers will be available and given an equal opportunity for employment.

(4) The contractor or subcontractor shall notify the awarding authority of opposition to the nondiscrimination provisions of a contract by individuals, firms or organizations during the term of the contract.

SEC. 12B.3. HUMAN RIGHTS COMMISSION EMPOWERED.

The San Francisco Human Rights Commission, its presiding officer and its director are hereby granted the power to do all acts and exercise all powers referred to in Section 12B.2 here of. [page 8]

SEC. 12B.4. NONDISCRIMINATION GUIDELINES.

The following nondiscrimination guidelines shall apply to all contracts and property contracts subject to this Chapter.

In order to be eligible to submit a bid or proposal or to have a bid or proposal considered by the awarding authority, the prospective contractor shall agree to abide by a nondiscrimination program which conforms to the requirements of the Commission.

The Commission may also require contractors and subcontractors to take part in a pre-bid or pre-award conference in order to develop, improve or implement a qualifying nondiscrimination program.

(a) Nondiscrimination programs developed pursuant to this Section shall be effective for a period of 12 months from the date of approval by the Commission. Contractors or subcontractors who are members in good standing of a trade association which has negotiated a nondiscrimination program with the Commission may make this association program their commitment for the specific contract or property contract upon approval of the Commission without the process of a separate

pre-bid or pre-award conference. Such an association agreement shall be effective for a period of 12 months from the date of approval by the Commission. Trade associations shall provide the Commission with a list of members in good standing in such association. The Commission shall annually supply contracting agencies of the City and County with a list of contractors and subcontractors who have developed approved nondiscrimination programs.

(b) The awarding authority shall be responsible for notifying all prospective bidders or proposers of the requirements of this Section and, when requested by the Commission, for notifying the Commission of each contract or property contract which is being proposed to be put to public bid.

(c) The proposed nondiscrimination program described by this Section, and the pre-bid or pre-award conference which may be required by the Commission, shall, without limitation as to the subject or nature of employment activity, be concerned with such employment practices as:

(1) Apprenticeship where approved programs are functioning, and other on-the-job training for nonapprenticeable occupations;

(2) Classroom preparation for the job when not apprenticeable;

(3) Pre-apprenticeship education and preparation;

(4) Upgrading training and opportunities;

(5) Encouraging the use of contractors and subcontractors of all ethnic groups, provided, however, that any contract or property contract subject to this Chapter shall require the contractor or subcontractor to provide not less than the prevailing wage, working conditions, and practices generally observed in private industries in the City for such work; and

(6) The entry of qualified minority journeypersons into the industry.

(d) Nondiscrimination agreements resulting from the proposed nondiscrimination [page 9] programs or the pre-bid or pre-award conferences shall not be confidential and may be publicized by the Commission at its discretion. In addition, the Commission may report to the Board of Supervisors, either on request of the Board or on its own initiative, on the progress or the problems which attend the implementation of these agreements or any other aspect of enforcement of this Chapter.

(e) Any job training or education program using the funds, facilities, or staff of the City which, in the judgment of the Board of Supervisors or the Commission, can make a contribution to the implementation of this Chapter shall submit reports to the Commission as requested and shall be required to cooperate with the contractors, subcontractors and unions and with the Commission for the effectuation of the nondiscrimination programs developed under this Chapter.

SEC. 12B.5. CHAPTER APPLIES ONLY TO DISCRIMINATORY EMPLOYMENT PRACTICES.

(a) This Chapter shall not confer upon the City and County of San Francisco or any agency, board or commission thereof any power not otherwise provided by law to determine the legality of any existing collective bargaining agreement and shall have application only to discriminatory employment practices by contractors or subcontractors engaged in the performance of City and County contracts or property contracts.

(b) The Board of Supervisors shall appropriate such funds from the General Fund of the City, subject to budgetary and fiscal provisions of the Charter, as it may deem necessary for the enforcement of this Chapter.

SEC. 12B.5-1. NONAPPLICABILITY, EXCEPTIONS AND WAIVERS.

(a) The Director shall waive the requirements of this Chapter under the following circumstances:

(1) Whenever the Director finds, upon the advice of the awarding authority, that there is only one prospective contractor willing to enter into a property contract with the City for use of City property on the terms and conditions established by the City, or that the needed goods, services, construction services for a public work or improvement, or interest in or right to use real property are available only from a sole source and the prospective contractor is not currently disqualified from doing business with the City, or from doing business with any governmental agency based on any contract compliance requirements;

(2) If the contracting department, board or commission certifies in writing to the Director that pursuant to Administrative Code Sections 6.30 or 21.25 the contract or property contract is necessary to respond to an emergency which endangers the public health or safety and no entity which complies with the requirements of this Chapter capable of responding to the emergency is immediately available; provided that such certification must be made prior to the Controller's contract certification;

(3) Where the City Attorney certifies in writing to the Director that the contract involves specialized litigation requirements such that it would be in the best interests of the City to waive the requirements of this Chapter.

(b) This Chapter shall not apply where the prospective contractor is a public entity and the Director finds that goods, services, construction services for a public work or improvement or interest in or right to use real property of

comparable quality or accessibility as are available under the proposed contract or property contract are not available from another source, or that the proposed contract or property contract is [page 10] necessary to serve a substantial public interest.

(c) This Chapter shall not apply where the contracting officer finds that the requirements of this Chapter will violate or are inconsistent with the terms or conditions of a grant, subvention or agreement with a public agency or the instructions of an authorized representative of any such agency with respect to any such grant, subvention or agreement, provided that the contracting officer has made a good faith attempt to change the terms or conditions of any such grant, subvention or agreement to authorize application of this Chapter.

(d) Upon the request of a potential contractor or upon the contracting officer's own initiative, after taking all reasonable measures to find an entity that complies with the law, the contracting officer may waive any or all of the requirements of this Chapter for any contract, property contract or bid package advertised and made available to the public, or any competitive or sealed bids received by the City as of the date of the enactment of this ordinance under the following circumstances:

(1) Where the contracting officer determines that there are no qualified responsive bidders or prospective contractors who could be certified by the Commission as being in compliance with the requirements of this Chapter and that the contract or property contract is for goods, a service or a project that is essential to the City or City residents; or

(2) Where the contracting officer determines that transactions entered into pursuant to bulk purchasing arrangements through federal, State or regional entities which actually reduce the City's purchasing costs would be in the best interests of the City; or

(3) Where the contracting officer determines that the requirements of this Chapter would result in the City's entering into a contract with an entity that was set up, or is being used, for the purpose of evading the intent of this Chapter, which is to prohibit the City from entering into contracts with entities that discriminate based on the criteria set forth in this Chapter;

(4) The waiver authority granted to contracting officers in this Section 12B.5-1(d) shall be subject to the requirements that:

(i) All proposed waivers must be submitted to the Director and the Clerk of the Board of Supervisors. All proposed waivers must set forth the reasons the contracting officer is requesting the waiver, what steps were taken to find an entity that complies with this Chapter and why the waiver does not defeat the intent of this Chapter, which is to prohibit the City from entering into contracts with entities that discriminate based on the criteria set forth in this Chapter. Such waivers shall be subject to the prior approval of the Director, who shall take action approving or denying a proposed waiver within 30 days of receiving a notification of a proposed waiver from a contracting officer. If after 30 days the Director has taken no action on the proposed waiver, the waiver shall be deemed approved. The Clerk of the Board of Supervisors shall list the notice of the proposed waiver at the rear of the next available Board agenda, and

(ii) Contracting officers report to the Director whenever such a waiver is granted within 5 days of granting the waiver, and

(iii) For any contract subject to approval by the Board, the contracting officer shall state in the approving resolution whether any waiver under this Section 12B.5-1(d) has been or is proposed to be granted for that contract, and [page 11]

(iv) The Director shall conduct quarterly comprehensive reviews of the use of the waiver authority by departments and

shall make a report to the Board of Supervisors. Contracting officers who have exercised waiver authority under this Section 12B.5-1(d) in the previous quarter must appear before a Board of Supervisors committee and report on their use of such waiver authority. If the Board finds abuse of waiver authority by a department under this Section 12B.5-1(d), either as a result of a report of the Director or upon its own initiative, the Board may by resolution transfer that waiver authority for that department to the Director, to be exercised by the Director upon recommendation of the contracting officer under any or all of the circumstances enumerated in this Section 12B.5-1(d);

(5) Nothing in this Section 12B.5-1(d) shall limit the right of the Board of Supervisors to waive the provisions of this Chapter.

(e) This Chapter shall not apply to (i) the investment of trust moneys or agreements relating to the management of trust assets, (ii) City moneys invested in U.S. government securities or under pre-existing investment agreements, or (iii) the investment of City moneys where the Treasurer finds that:

(1) No person, entity or financial institution doing business in the City and County which is in compliance with this Chapter is capable of performing the desired transaction(s); or

(2) The City will incur a financial loss which in the opinion of the Treasurer would violate his or her fiduciary duties. This subparagraph (e) shall be subject to the requirement that City moneys shall be withdrawn or divested at the earliest possible maturity date if deposited or invested with a person, entity or financial institution other than the U.S. government which does not comply with this Chapter.

(f) The General Manager of the Public Utilities Commission may waive the requirements of this Chapter where the contractor is providing wholesale or bulk water, power or

(f) The General Manager of the Public Utilities Commission may waive the requirements of this Chapter where the contractor is providing wholesale or bulk water, power or natural gas, the conveyance or transmission of same, or ancillary services such as spinning reserve, voltage control, or loading scheduling, as required for assuring reliable services in accordance with good utility practice, to or on behalf of the San Francisco Public Utilities Commission; provided that the purchase of same may not practically be accomplished through the City's standard competitive bidding procedures; and further provided that this exemption shall not apply to contractors or franchisees providing direct, retail services to end users within the City and County of San Francisco.

(g) Sections 12B.1(b) and 12B.2(b) shall not apply to any contracts or property contracts executed or amended prior to June 1, 1997, or to bid packages advertised and made available to the public, or any competitive or sealed bids received by the City, prior to June 1, 1997, unless and until such contracts or property contracts are amended after June 1, 1997, and would otherwise be subject to this Chapter.

SEC. 12B.6. SEVERABILITY.

This Chapter shall be construed so as not to conflict with applicable federal or State laws, rules or regulations. Nothing in this Chapter shall authorize any City agency to impose any duties or obligations in conflict with limitations on municipal authority established by federal law at the time such agency action is taken.

In the event that a court or agency of competent jurisdiction holds that State or [page 12] federal law, rule or regulation invalidates any clause, sentence, paragraph or section of this Chapter or the application thereof to any person or circumstances, it is the intent of the Board of Supervisors that the court or agency sever such clause, sentence, paragraph or section so that the remainder of this Chapter shall remain in effect.

APPENDIX G

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

S. D. MYERS, INC., Plaintiff, vs. CITY and COUNTY OF SAN FRANCISCO, and SAN FRANCISCO HUMAN RIGHTS COMMISSION,	Case No. C 97-4463 CW STIPULATION REGARDING PLAINTIFF'S PERSONNEL AND BENEFITS' POLICIES

[page 2] Defendant City and County of San Francisco ('the City") has noticed the depositions of the persons employed by plaintiff S. D. Myers, Inc., ("Myers") most knowledgeable about the establishment, formulation, modification and implementation of Myers' personnel policies. In an effort to avoid the time and expense associated with such depositions, the City and Myers stipulate to the following facts regarding Myers' personnel and benefit policies.

1. Myers provides benefits to employees and spouses of employees. These benefits include, but are not limited to an optional dental plan for employees and their spouse, an optional medical plan for employees and their spouses, bereavement and family medical leave for employees, and sick and vacation pay for employees.

2. The City's Equal Benefits Ordinance, San Francisco Administrative Code §§ 12B and 12C, requires that contractors with the City agree not to discriminate between employees with spouses and employees with domestic partners in the benefits for employment that the contractors provide ("the equal benefits requirements").

3. Myers believes that the equal benefits requirements are unlawful.

4. Myers is unwilling to comply with any of the City's equal benefits requirements, even if Myers' unwillingness to comply means that Myers would consequently be ineligible for the award of a City contract. For example:

a. The Ordinance requires that contractors that offer health and dental benefits that cover the health of an employee's domestic partner. Myers offers health and dental benefits that cover the health and dental car of the employee's spouse. Myers is unwilling to agree to offer benefits that cover the health of an employee's domestic partner.

b. The Ordinance requires that contractors that offer bereavement leave to employees for the death of a spouse or a member of a spouse's family, also agree to offer bereavement leave to employees for the death of a domestic partner or member of a domestic partner's family. Myers offers paid bereavement leave to an [page 3] employee when a spouse or a member of a spouse's family dies. Myers is unwilling to agree to make bereavement leave available to an employee with a domestic partner should the partner or a member of the partner's family die.

c. The Ordinance requires that contractors that offer family medical leave to an employee to care for a spouse who may be ill, also agree to offer such leave to an

employee to care for a domestic partner who may be ill. Myers offers unpaid family medical leave to a married employee to care for a spouse who is ill. Myers is unwilling to agree to offer family medical leave to an employee whose domestic partner may be ill.

5. The policies of S. D. Myers listed above were the policies in effect throughout 1997 and are the policies in effect today.

6. As part of the litigation in *Air Transport Association v. City and County of San Francisco* (No. C97-1763 CW), the City filed declarations from several individuals. Myers stipulates and agrees that the City can rely in this litigation on the following such declarations by attaching them to a declaration of counsel and filing the declaration of in conjunction with the City's summary judgment papers: declarations of Nancy Adler, Ken Bradshaw, Samuel Colt, Patricia Jose, Drucilla Ramey, Louise Rothman, Jim Schmidt and Paulette Wrede. By so stipulating, Myers in no way waives its right to raise any other evidentiary objections to these declarations.

DATED: November 25, 1998

THE AMERICAN CENTER
FOR LAW AND JUSTICE

By: /s/ GARY S. MCCALEB
GARY S. MCCALEB

Attorneys for Plaintiff

[page 4] DATED: November 24, 1998

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BY: /S/ G. SCOTT EMBLIDGE
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APPENDIX H

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

S.D. MYERS, INC. Plaintiff, vs. CITY and COUNTY OF SAN FRANCISCO, and SAN FRANCISCO HUMAN RIGHTS COMMISSION, Defendants.	) Case No.) C 97- 4463 CW))))) AFFIDAVIT OF DANA S.) MYERS IN SUPPORT OF) PLAINTIFF'S MOTION FOR) SUMMARY JUDGMENT))))

I, Dana S. Myers, being duly sworn, upon oath depose and state as follows:

1. I am the president of S.D. Myers, Incorporated ("SDMI"). SDMI is an Ohio corporation with its principal office located in Tallmadge, Ohio. SDMI maintains large electrical [page 2] transformers under contracts with government and private entities throughout the United States.

2. SDMI was founded by my father, Stanley D. Myers, who preceded me in the presidency of SDMI. He founded and operated the company on Christian Biblical principles, and I continue to apply Biblical principles in all aspects of conducting SDMI's business.

3. SDMI employs about 400 persons, of which approximately 370 work at the Tallmadge, Ohio plant. Virtually all technical, support, supervisory and administrative

tasks for the company are conducted at the Tallmadge location. The balance of our employees work at sales offices in Fremont, California; Houston, Texas; Seattle, Washington; Rockhill, South Carolina; Colorado Springs, Colorado; and Naples, Florida.

4. Employees of SDMI receive employment benefits which include health, vision, and dental insurance, disability insurance, life insurance, bereavement pay, and family medical leave.

5. Lawful spouses of married SDMI employees may participate in the health, vision, and dental insurance programs. No person other than an SDMI employee or the lawful spouse of an SDMI employee may participate in employment benefits from SDMI.

6. Providing health, vision, dental, disability, and life insurance requires that SDMI determine the eligibility of employees for the benefit, calculate benefit levels, oversee plan management, administer payroll deductions, monitor and disburse funds, and keep appropriate records.

7. Bereavement pay is provided to SDMI employees when the employee suffers a death in his or her immediate family. "Immediate family" for the purposes of bereavement pay, means a lawful spouse, child, parent, brother, or sister. Providing bereavement pay requires that SDMI determine eligibility of the employee and monitor the employee's work and vacation time.

8. Family medical leave is provided to employees pursuant to the federal Family Medical Leave Act. It requires that we determine eligibility for the benefit, monitor work and vacation time of the affected employees, and otherwise comply with the Act's requirements.

9. In 1997, the City of San Francisco, California ("City"), invited bids for a maintenance project on City-owned electrical transformers located on property under the control of the Hetch [page 3] Hetchy Water and Power System, Moccasin, California. This project was identified as Bid No. Bid ITSF98000092/CD Major Maintenance of Transformers ("Hetch Hetchy Contract").

10. SDMI prepared a bid for the Hetch Hetchy Contract and submitted it to the City on or about September 16, 1997. SDMI anticipated that if the contract was awarded, it would assign approximately four Ohio-based employees to perform the on-site work.

11. Typically, when we assign employees to out-of-state projects, we support them from Ohio with administration, supervision, and procurement services. The on-site team may obtain supplies for the contract from a number of local and out-of-state suppliers, as well as the Ohio plant.

12. On or about November 5, 1997, SDMI received notice from the City that it was prepared to award the Hetch Hetchy Contract to SDMI, based upon SDMI's technical qualifications and its bid in the amount of $143,455.00. The City further stated that SDMI "must be approved by Human Rights Commission ("HRC") no later than November 19, 1997" or SDMI's bid would be considered nonresponsive.

13. In order for SDMI to be approved by the HRC, SDMI would have had to provide employment benefits to "domestic partners" of our employees equivalent to those provided to lawful spouses of married SDMI employees, as required by the newly enacted Chapter 12B of the City's Administrative Code. Furthermore, SDMI would also have had to file a sworn affidavit stating that it would comply with Chapter 12B.

14. "Domestic partners," for the purposes of Chapter 12B, were defined as "two adults who are not married to each other or to anyone else, who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership." Such a "domestic partner" could be of the same sex, or the opposite sex, of their partner.

15. The terms "live together" and "intimate" in the definition of "domestic partners"commonly describe a sexual relationship between two persons. It would violate the Christian Biblical principles of SDMI to affirmatively swear that it would treat unmarried couples the same as lawfully married couples, and to provide economic benefits to a couple solely on the [page 4] basis of the couple's nonmarital relationship.

16. The conduct of SDMI in not providing "domestic partner" benefits is entirely legal within the state of Ohio.

17. To provide "domestic partner" benefits, SDMI would have had to alter its health, vision, dental, disability, and life insurance plans, and to determine the eligibility of employees for "domestic partner" benefits, calculate benefit levels, make disbursements, monitor availability of funds and delivery of the benefits, oversee management of the plans, and keep appropriate records on an ongoing basis. SDMI would also have had to provide bereavement pay to an employee who had a "domestic partner" if the "domestic partner" died, and to provide to provide family medical leave for "domestic partners," to the extent required by the Family Medical Leave Act.

18. If we were to comply with Chapter 12B, we would have to conform our benefit plans to San Francisco city law, rather than follow the national standards set by ERISA and other

federal laws. Because we do business with numerous local governments and other public entities, we were extremely concerned that should other cities pass similar legislation, we would have to change our benefit plans and business practices day-by-day or contract-by-contract. This would create significant costs for the company and an administrative nightmare. It would be difficult enough to re-order our operating and administration procedures to accommodate a single city's local anti-discrimination law; it would be virtually impossible if other cities began imposing similar laws to further their own philosophies, which certainly would not be wholly congruent with one another.

19. On or about November 13, 1998, I wrote to Mayor Brown regarding the requirements of Chapter 12B. In that letter, I told Mayor Brown that the First Amendment prohibited the government from interfering with the religious worship of God by private citizens, and that Chapter 12B violated the First Amendment because it forced SDMI to violate its Christian principles by affirming non-marital relationships. Furthermore, Chapter 12B required that I, and the company of which I am president, affirm and economically support unmarried intimate relationships or risk fines and/or the loss of our contract. After noting that the First Amendment protected religious beliefs and giving examples of the government accommodating religious practices, I requested that the Mayor [page 5] relieve us of the Chapter 12B requirements.

20. On or about November 20, 1997, I received a letter from Mayor Brown. In his letter, Mayor Brown insisted that a company was obligated to give married employees and employees with a "domestic partner" the same benefits. He said other businesses recognized the fairness of giving "domestic partner" benefits and that, if SDMI did not understand the "implicit equity" in supporting unmarried relationships, then it might be "best" for SDMI to "reconsider its business relationship with San Francisco."

21. The City did not honor our request for an exception, even though other companies could be excused from compliance with Chapter 12B for non-religious reasons.

22. On or about November 24, 1997, the City deemed our bid for the Hetch Hetchy contract "nonresponsive" only because SDMI would not comply with the Chapter 12B nondiscrimination provisions. The contract was awarded to another company.

23. The City's refusal to award the contract economically damaged SDMI, and continues to damage SDMI because the City will not award any future contract to SDMI unless SDMI consents to affirmatively support unmarried intimate relationships among its employees. Simply put, SDMI is prohibited from doing business with the City unless and until the owners of SDMI change their religious and moral beliefs as well as their business practices.

24. Prior to the enactment and enforcement of Chapter 12B, the City required its contractors to not discriminate on the basis of sexual orientation, but did not require that its contractors affirmatively support nonmarital sexual relationships. Because there was no requirement that SDMI affirmatively endorse or support nonmarital relationships, there was no conflict with the Christian principles by which SDMI operates.

25. SDMI is not able to comply with the Chapter 12B nondiscrimination provisions because it compels SDMI to effectuate the City's local moral views and affirmatively equate nonmarital relationships with lawful marriage. Also, complying with the Chapter 12B would impose substantial direct and indirect costs because of the extensive changes in our business practices required by the ordinance. [page 6]

I declare under penalty of perjury under the laws of the State of Ohio that the foregoing is true and correct.

Executed on November 18, 1998 at Tallmadge, Ohio.

/S/ Dana S. Myers
Dana S. Myers

STATE OF OHIO)
) SS.
COUNTY OF SUMMIT)

Personally appeared before me the above-named Dana S. Myers and first being duly sworn deposed and declared by his foregoing signature that the factual allegations of this Affidavit are true and correct.

Subscribed and sworn to me this 18th day of November, 1998.

/S/Kathleen M. Cole
Notary Public

APPENDIX I

Equal Benefits Five-Year Report - Nov. 14, 2002

November 14, 2002

Virginia M. Harmon
Director

Report prepared by:

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Appendix A. Resource Materials

[page 1] **I. Executive Summary**

On June 1, 1997, the City and County of San Francisco set in motion a revolution. With its longstanding history of anti-discrimination laws as a foundation, (1) San Francisco enacted the first law in the United States to address discrimination in employee benefits for employees with domestic partners. Referred to as the Equal Benefits Ordinance, the law requires San Francisco's City contractors to provide the same benefits to employees who have domestic partners (2) and employees who are married. This report looks at the first five

years of implementation - studying the law's impact in San Francisco and across the country.

Despite the fact that the concept of offering domestic partner benefits to employees was already over a dozen years old at the time the Equal Benefits Ordinance was enacted, only 500 employers in the U.S. offered such benefits. Today, over 4,500 employers extend these benefits. The San Francisco Equal Benefits Ordinance has been credited with playing a major role in this explosion of domestic partner benefits (3) with over 75% of the companies offering domestic partner benefits doing so in compliance with the City's contracting requirements. During the first five years of implementation, the concept of employer-provided domestic partner benefits moved from the far fringes of the fringe-benefit landscape to become commonplace among employee benefits offerings.

The number of employees working for City contractors that have utilized medical benefits for their domestic partners has surpassed 50,000 and can be found in at least 39 states and 500 cities across the country. Even when, a year after the law went into effect, a court decision gave companies the option to limit where they extended nondiscriminatory benefits, just over one percent of the complying companies chose to do so.

By prompting a surge in the number of employers offering domestic partner benefits, the San Francisco Equal Benefits Ordinance played a key role in building a foundation for the dramatic expansion of California laws protecting the rights of domestic partners.
Geoff Kors, Executive Director
California Alliance for Pride and Equality

The legal landscape for domestic partners has changed significantly during the past five years. The number of governmental domestic partnership registries has nearly doubled since the Equal Benefits Ordinance was passed and the benefits associated with registration continue to expand. (4)

While at first these registries represented a symbolic means for recognizing committed relationship, more and more registration now brings with it some of the rights associated with marriage. With the opportunity for domestic partners to identify themselves in the U.S. Census, growth in the [page 2] number of domestic partnerships cannot be disputed. In fact, the 2000 Census noted the presence of same-sex domestic partnerships in all Congressional districts and in all but 22 counties in the entire United States.

Even as the U.S. economy has experienced a downturn, the number of City contractors extending domestic partner benefits continues to increase and the use of waivers to contract with non-compliant companies steadily decreases. Also impressive in this economic climate, is the continued growth in the number of other cities across the United States enacting Equal Benefits Ordinances in their jurisdictions.(5)

II. Compliance Update

This report examines the implementation effort of fiscal year 2001-2002 as well as the impact and performance of the Equal Benefits Ordinance since its enactment five years ago.

A. Employers Offering Domestic Partner Benefits

From the first offering of domestic partner benefits by the Village Voice Newspaper in 1982 until the introduction of the Equal Benefits Ordinance fifteen years later, only 500 companies extended domestic partner benefits to their employees. Five years later, that number has surged. As of June 30, 2002, the Human Rights Commission helped 3,500 City Contractors extend benefits to the domestic partners of their employees. Nationwide, over 4,500 employers have been documented as offering such benefits. (See Fig. 1)

3,500 City Contractors Offering Domestic Partner Benefits

Fig. 1 (above)

Complying Companies [page 3]

As of June 30, 2002, 11,233 contractors submitted compliance paperwork to the Commission. Of those, the status of 8,163 has been finalized with 7,669 (94%) of them having been placed into compliance (having ended any existing discrimination in the provision of benefits) and only 494 (6%) determined to be non-compliant. (See Fig. 2.) This rate of compliance has slowly increased over the past five years. (See Fig. 3.) The remaining 3,070 are still pending. (6)

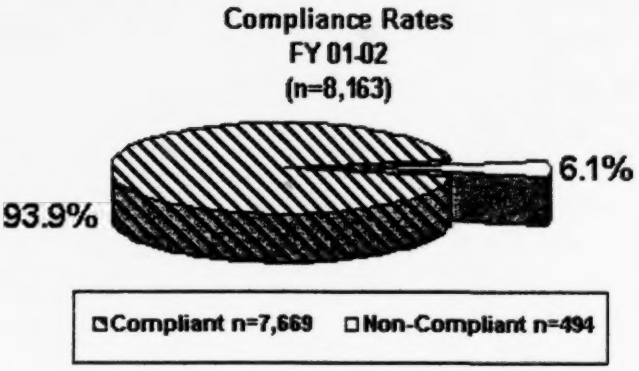


Fig. 2 (above)

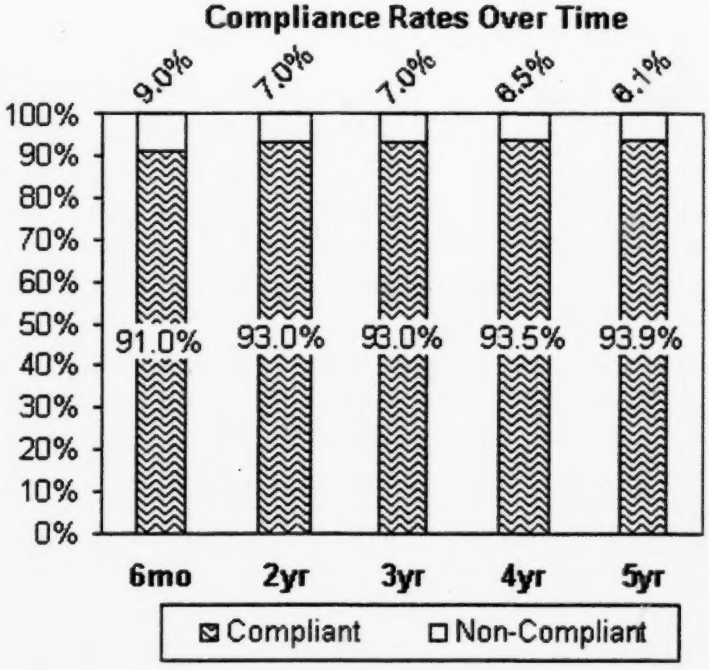


Fig. 3 (above)

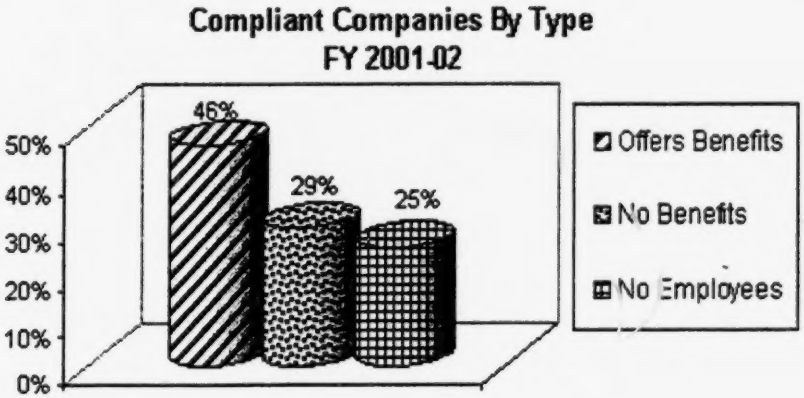


Fig. 4 (above)

C. Compliance By Type

The goal of the Equal Benefits Ordinance is to eliminate discrimination in the provision of employee benefits offered to married employees and employees with domestic partners. Contractors may avoid discriminating, and thereby comply with the Ordinance, in one of three ways. They may: (1) offer employee benefits that don't discriminate between spouses and domestic partners; (2) offer no employee benefits based on marriage or domestic partnership; or (3) have no employees. Of the 7,669 contractors complying by the end of fiscal year 2001-2002, forty-six percent (3,501) offer nondiscriminatory benefits to their employees, twenty-nine percent (2,216) [page 4] do not offer any benefits based on marriage or domestic partnership to their employees, (7) and twenty-five percent (1,952) do not have any employees (such as sole proprietors). (See Fig. 4.)

Over the past five years, the proportion of contractors complying with the Equal Benefits Ordinance in each of these three ways has remained fairly constant. There has been a slight increase in the percentage of companies offering nondiscrim-

inatory benefits, mostly reflected within the first two years, and a rise in the percentage of contractors without employees.

The most significant change has been a 6% decrease in the number of companies not offering benefits. This decline has continued over the five years of implementation and refutes the assertion that Equal Benefits legislation encourages employers to take away benefits they might otherwise offer. (See Fig. 5).

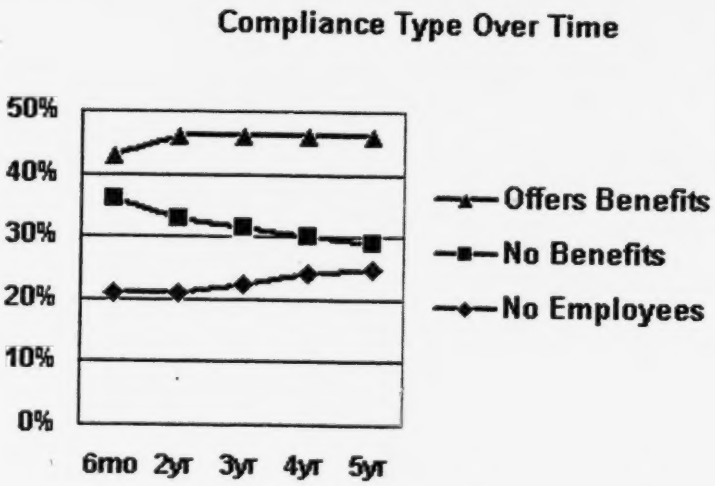


Fig. 5 (above)

D. Company Size

As of the 2001-2002 fiscal year, 52 large companies (5,000 or more employees), 173 medium sized companies (500 to 4,999 employees) and 3,219 small companies (under 500 employees) comply by offering nondiscriminatory benefits. (8) (See Fig. 6.) These proportions have remained fairly consistent during the life of the Ordinance (see Fig. 7) and because they are reflective of the U.S. business community in general, (9) they indicate that, regardless of company size, compliance with the Equal Benefits Ordinance is equally feasible.

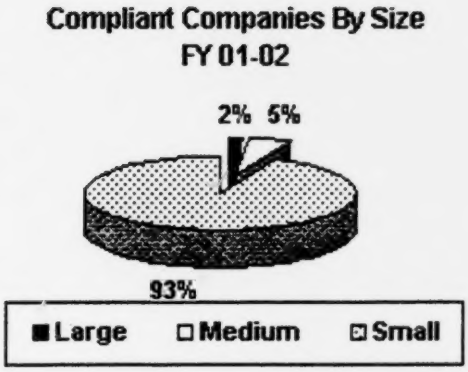


Fig. 6 (above)

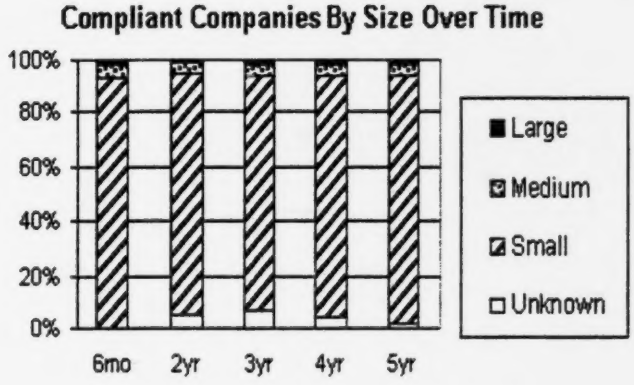


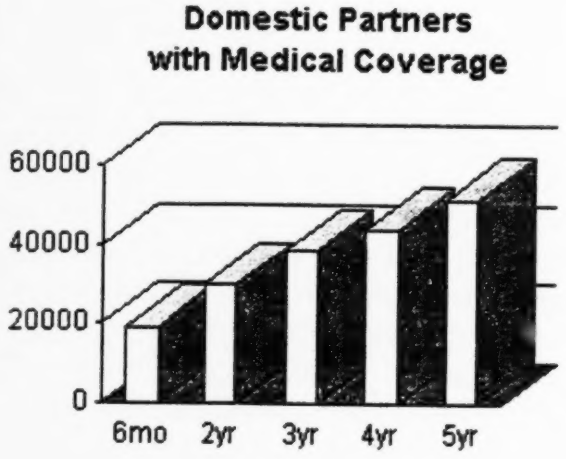
Fig. 7 (above)

E. Employees Covered [page 5]

City contractors offering domestic partner benefits employ a nationwide pool of approximately 1,722,000 people, reflecting an increase of almost 246,000 people in fiscal year 2001-2002. With actuarial statistics indicating an enrollment rate in domestic partner medical benefits offered to both same and opposite sex couples averaging 3% in the private sector, this

means there are approximately 51,660 people who have taken advantage of this benefit through the programs offered by City contractors. This is an increase of approximately 7,380 insured domestic partners in the past year alone and reflects a steady growth in the number of individuals assisted by the City's policy. (See Fig. 8.) Of course, these figures don't take into account the children of domestic partners who also become eligible for insurance coverage, nor are other types of benefits, such as bereavement leave or retirement benefits, reflected here.

Fig. 8 (below)



Shortly after my employer extended domestic partner benefits, my partner's father died. Without the Equal Benefits Ordinance, I wouldn't have had the opportunity to travel with my partner and support him and his family during a difficult time.

Crispin Hollings

F. Companies Limiting Compliance

In April 1998, a U.S. District Court ruling (10) changed the scope of the Ordinance by allowing companies to limit their compliance geographically and allowing some companies to limit which benefits they offer in a nondiscriminatory manner. (11)When a company elects to comply on this basis, their compliance effort must be reviewed each time a new contract is contemplated to ensure that the scope of compliance is appropriate to the anticipated scope of work. Hence, this form of compliance is considered to be on a "contract-by-contract" basis.

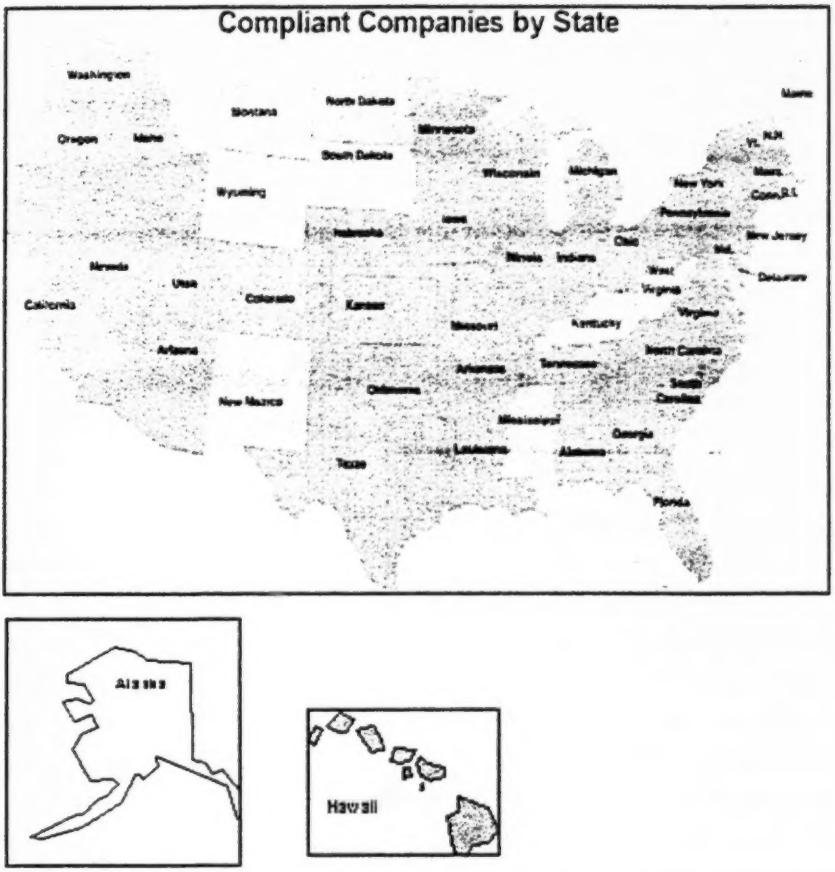
Since the 1998 ruling, only 95 companies have elected to comply on a limited basis by continuing to discriminate in certain locales or in how certain benefits are offered. This reflects an increase of only 18 companies in the past year. Companies complying on a limited basis comprise just slightly more than one percent of the total number of complying companies (which includes those offering nondiscriminatory benefits as well as those not offering benefits or having no employees), and only 2.7% of complying companies that offer benefits. Sixty-two of these companies have limited the geographic reach of their compliance; five have limited [page 6] the benefits offered and twenty-eight have limited both.(12) Since 1998, the use of contract-by-contract compliance has not risen significantly. (See Fig. 9.) In the first year it was available, it represented slightly less than one percent of the total number of compliant companies (.9%). In the fifth year, it represents just slightly more than one percent (1.2%).

Fig. 9

Geography

The national impact of the Equal Benefits Ordinance is perhaps best seen when looking at where in the United States complying companies are located. Since the City and County of San Francisco conducts business in a broad range of industries (from operating a hospital, airport, power plant and train system to issuing bonds, running museums and feeding the bison residing in Golden Gate Park) it attracts contractors from every state in the nation.

After five years of Equal Benefits implementation, compliant contractors can be found in at least 44 states, plus the District of Columbia, and in over 900 cities across the country. (13) The majority, approximately 87%, are located in California, with 41.5% located in San Francisco. Companies that comply by offering benefits can be found in at least 39 states and the District of Columbia, and in almost 500 cities nationwide. (See Fig. 10.) [page 7]



States with Compliant Companies Offering Benefits

States with Compliant Companies Not Offering Benefits

States with No Compliant Companies

Fig. 10 (above)

H. Waivers

In limited circumstances, when the City has no choice but to contract with a company that refuses to end its discriminatory behavior, a waiver of the ordinance may be granted. Primarily,

this occurs when the contractor is the sole source for needed services or goods. Occasionally, there will be more than one potential contractor and all will refuse to comply. When this circumstance occurs, competitive market forces are used to encourage at least one potential contractor to comply.

Other types of waivers permitted by the Ordinance include when:

- there is an emergency that threatens public health or safety;

[page 8]

- a public entity offers the City needed goods or services of a quality or accessibility that is unavailable from another source, or the proposed contract is necessary to serve a substantial public interest;

- a transaction entered into through a bulk purchasing arrangement established by a governmental or regional entity would actually reduce the City's purchasing costs and would be in the City's best interest;

- it is necessary to avoid conducting business with an entity that was set up or is being used for the purpose of evading the intent of the Ordinance.

This past year, City departments requested a total of 1,287 waivers, 1,263 of which were approved. Use of the different types of waivers over the past five years breaks down as follows: (2 yr - 4 yr omitted)

	1 YR(14)			5 YR		
	A	D	W	A	D	W
Sole Source	1301	56	15	1154	13	6
Public Entity	42	-	-	31	-	-
Emergency	11	2	2	6	-	1
Bulk Purchasing (15)	1	-	-	-	-	-
No. Co. Complies	43	-	-	72	3	1
Sham/Shell	-	-	-	-	-	-
TOTAL	1398	40	17	1263	16	8

A = Approved, D = Denied, W = Withdrawn

Table 1

While waiver use in fiscal year 2001-2002 reflects a slight increase of 3.9% in waivers approved, there has been a much larger decrease of 10.7% since the Ordinance became effective. (See Table 1 and Fig. 11.)

It is important to note that some waivers are granted in situations where the contracting entity does in fact offer domestic partner benefits, but those benefits are offered on a basis that is more limited than what the Equal Benefits Ordinance requires. For instance, some companies extend [page 9] domestic partner benefits only to same-sex domestic partners. Other companies may extend medical insurance benefits to domestic partners, but refuse to amend their leave policies or retirement plans so that employees with domestic

policies or retirement plans so that employees with domestic partners are treated in the same manner as employees with spouses.

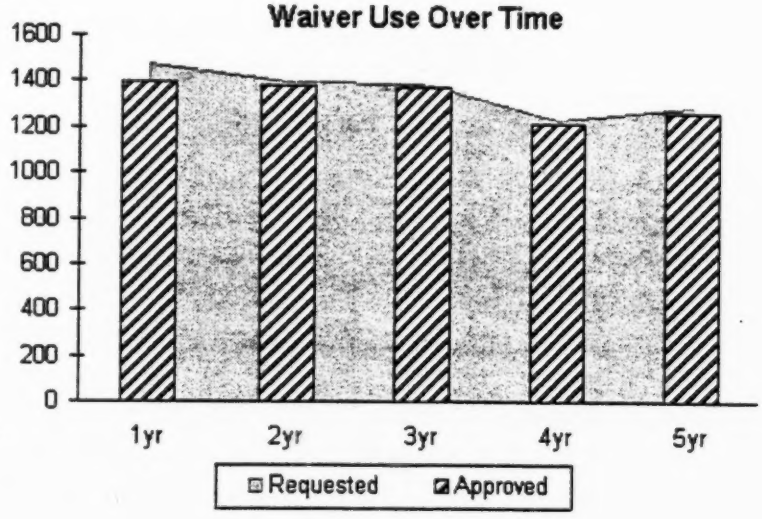


Fig. 11 (above)

The University of California (UC), which over the past five years has received the most City dollars as a result of waivers, is an example of this circumstance. UC offers medical insurance benefits to same-sex domestic partners and retirement benefits to all domestic partners. While their benefits scheme is not eligible for Equal Benefits compliance status (at a minimum because opposite-sex domestic partners are not fully included) their policies are more in line with the intent of the legislation than would be a company that offers no domestic partner benefits whatsoever.

Of the ten entities receiving the largest amount of City money as a result of waivers, one (16) has since become compliant with the requirements of the Ordinance, five (17) offer domestic partner benefits that are not fully compliant with the

City's requirements, and the remaining four (18) offer no domestic partner benefits. Of these four, three are public entities. It is common for the City to contract with other public entities in order to satisfy a Federal or State mandate. For instance, all three public entities were contracted with to fund noise insulation projects that were mandated by the State of California in order for the City to be permitted to continue to operate its airport.

The Commission continues to work with departments and contractors to reduce the number of waivers granted each year. Even for contracts where a waiver might be appropriate, the Commission and contracting departments work together to convince companies to comply so that a waiver is unnecessary.

I. Insurance Industry

In addition to influencing the employee benefit policies of City contractors, the Equal Benefits Ordinance has had a noticeable impact on the insurance industry. When the Ordinance was first enacted, only a handful of insurance companies were willing to write policies that covered domestic partners. Even fewer were willing to do so for employers with a small number of employees and many insurers charged an additional fee when domestic partners were included.

[page 10] As more and more companies from across the country approach insurers requesting domestic partner coverage, the insurance industry has responded. Today, it is much easier for employers to find insurance plans inclusive of domestic partners. With market competition at play, and clear actuarial statistics indicating that claims for domestic partners are no more expensive than those of spouses, the practice of levying surcharges has virtually been eliminated. In California and Maine, laws are in effect requiring insurance companies that provide spousal coverage to provide the same coverage to domestic partners. (19)

III. Legislative Update

The legislative landscape concerning domestic partners has expanded dramatically over the past five years with an increase in the number of domestic partnership registries and equal benefits laws, and the creation of new rights for domestic partners.

A. Contracting Legislation

Since San Francisco enacted the Equal Benefits Ordinance in 1997, the law has been replicated in six other jurisdictions up and down the Western seaboard. (20) Most recently, Oakland, California passed an Equal Benefits law that took effect on July 1, 2002. Broward County Florida enacted a provision in 1999 giving an advantage in bidding to businesses offering domestic partner benefits. (21) In 2001, Portland, Maine passed a law requiring organizations accepting City funds for certain housing and neighborhood services programs to offer domestic partner benefits to their employees. (22)

Several contractors have stated to us that the addition of cities like Seattle to the growing list of governmental jurisdictions that require these benefits created a "tipping point," which motivated them to changing their policies and practices.

Brenda Bauer, Director of Contracting Services, City of Seattle

Other cities continue to contact the Commission for information as they consider enacting Equal Benefits Ordinances. These include the cities of Atlanta, Georgia (23) as well as New York City, where an Equal Benefits Ordinance was introduced for consideration by the City Council in September 2002. As more and more cities enact such measures, not only will more city contractors offer domestic partner

coverage to their employees, the availability of domestic partner insurance products will increase as well.

B. Domestic Partnership Registries [page 11]

When the ordinance was first enacted, there were only 33 jurisdictions where domestic partners could register their relationships. Now, there are at least 63 such registries, 58 local government registries (in 21 different states), and five states registries. (24) Some of these registries allow partnerships to be formed even when neither partner lives or works in the jurisdiction (which is similar to most marriage laws). This makes it possible for couples to register even when there is no registry in their city or state. (25)

In addition to giving domestic partners a place where their relationships may be formalized, government-sponsored registries act as an important stepping stone in the path to creating legal rights for domestic partners. Having a mechanism by which partnerships may be counted helps elected officials demonstrate the existence of a constituency in need of such legal protections. In forty-one of the jurisdictions with registries, some legal right or protection is extended along with registration. These rights are diverse and include hospital and jail visitation, the power to make medical decisions for an incapacitated partner, rent control and eviction protections, access to children in school, tax exemptions and more.

C. California Domestic Partnership Legislation

The California legislature continues to aggressively pursue expanding the rights of domestic partners under State law. Each session, several bills are introduced that, if passed, would significantly enhance the rights of domestic partners within the State. On January 1, 2002, the legal protections contained in one such measure, Assembly Bill 25 (Migden), went into effect. This law offers a variety of new legal protections and

benefits for domestic partners in California. Three of the new law's provisions are particularly significant to the Equal Benefits Ordinance. The first exempts domestic partner health insurance benefits from state income taxation. The second allows use of employer-sponsored sick leave to care for an ill domestic partner or child of a domestic partner. The third, mentioned above, requires that health insurers doing business in California offer domestic partner coverage whenever spousal coverage is offered.

In the most recent legislative session four domestic partner-related bills were successfully passed by both houses of the Legislature and signed into law by Governor Davis. Among them is Assembly Bill 2216 (Keeley), which gives registered domestic partners the right to inherit a specified share of a partner's property if the partner dies without a will. Also included is Senate Bill 1661 (Kuehl), that establishes an insurance program to provide up to 6 weeks of partially paid leave for people to take time off work to care for a seriously ill domestic partner, spouse, child, or parent, or to bond with a newborn or newly adopted child.

Other domestic partner bills did not fare as well. Assembly Bill 1080 (Kehoe), which would have created a State version of an Equal Benefits law, successfully passed out of the Senate but reached the Assembly just three days before the end of the legislative session, which [page 12] proved too late for consideration. Governor Davis vetoed Assembly Bill 2862 (Migden), which would have made changes to existing domestic partner laws affecting the health care and retirement benefits of state employees. Finally, Senate Constitutional Amendment 9 (Speier) would have, under certain circumstances, exempted co-owners of a primary residence from property tax reassessment if a transfer occurs due to the death of one of the co-owners. This would have eased a tax burden on surviving domestic partners that is not faced by

surviving spouses. This measure was passed by the Senate but got held up in the Assembly Appropriations Committee.

D. Domestic Partnership Rights in San Francisco

San Francisco continues to be in the forefront of expanding the rights of domestic partners. In October 2002, San Francisco became the first county in California to end the practice of reassessing domestic partners' shared property after one partner dies. Previously, the reassessment of property occurred when the deceased partner's interest in the property was transferred to the surviving partner. Married couples are exempt from this reassessment.

Under the prior system, the surviving domestic partner could face financially burdensome tax bills, especially older individuals who may have owned a home for many years and find that it is assessed at a much higher value. For some, it has meant selling their homes because the increased taxes were too onerous. As mentioned above, legislation that would make this change on a statewide basis was unsuccessful but its proponents have expressed their intent to raise it again during the next legislative session.

IV. Litigation Update

This past year brought successful closure to most of the litigation challenges facing the Equal Benefits Ordinance since its enactment. Two of the three the lawsuits filed against the City challenging the legality of the Ordinance have concluded with the majority of the law intact. The third remains on appeal.

A. Air Transport Association

The first lawsuit was filed by the Air Transport Association (ATA), representing a collection of the nation's largest airlines. They alleged that the Ordinance violated preemption language found in the Employee Retirement Income Security Act (ERISA), the Airline Deregulation Act and the Railway Labor Act, as well as that the Ordinance violated the Due Process and Commerce Clauses of the U.S. Constitution and sections of the California Constitution and San Francisco City Charter. A partial decision was issued on April 10, 1998(26) upholding the ordinance in large part, and creating two areas of limited application with respect to particular types of City contractors.

One area of limitation created by the 1998 Court decision affects the City's ability to enforce the Ordinance with respect to a contractor's operations throughout the United States. While it [page 13] is still City policy to encourage contractors to comply throughout the U.S., the City may only require compliance in a contractor's operations located (a) in San Francisco; (b) on real property outside of San Francisco owned by the City or which the City has a right to occupy; and (c) elsewhere in the United States where work relating to a City contract is being performed. As described on page 5, very few complying contractors have chosen to comply on this limited basis.

For an even smaller group of City contractors, the 1998 decision created changes to the scope of benefits covered by the Equal Benefits Ordinance. Most often, when the City goes into the marketplace for goods, services or an interest in real property, it is acting in the role of an ordinary consumer because it wields no more power in the marketplace than other contracting entities. As such, it can require that contractors provide all benefits, including health and pension benefits, in a nondiscriminatory way.

However, in certain situations the Court felt that the City wields more power than an ordinary consumer and instead acts as a regulator. In those rare instances, the City cannot require that its contractors provide nondiscriminatory health and pension benefits; the City is preempted from doing so by a federal law regulating employer-provided health and pension plans (ERISA). (27) The primary effect of this ruling has been on the airlines leasing space at the City's airport.

Despite the limited impact of the law on them, the airline plaintiffs pursued an appeal of the Court decision to the extent the City was allowed to require that the airlines offer other (non-ERISA) benefits in a nondiscriminatory manner. This includes bereavement leave, family medical leave, and company discounts such as the flight benefits offered by the airlines. The airlines also alleged that the State of California's domestic partnership registry preempts the City's ability to enforce the Equal Benefits Ordinance. Their appeal regarding the non-ERISA benefits was unsuccessful and the preemption question was remanded to the District Court for consideration. In June 2002, the District Court rejected the preemption argument, and no appeal was filed. In the interim, many of the nation's largest airlines, including American, Delta, United and others, extended some domestic partner benefits to their employees, including the much fought-over health insurance benefits.

B. Religious-Based Lawsuits

The second and third lawsuits were filed in the names of businesses expressing religious objections to the Ordinance. Attorneys in both cases were affiliated with the American Center for Law and Justice, a non-profit legal organization associated with televangelist Pat Robertson, and both filed causes of action similar to those filed by the airlines. The first suit was filed by an electrical contracting company alleging it would be denied City contracts because of its refusal to comply

with the Ordinance. Their case was voluntarily dismissed because of a lack of standing; the company had never sought a City contract. The third lawsuit, filed by S.D. Myers, Inc. an Ohio-based company, suffered defeat at both the District Court level and on appeal to the U.S. Court of Appeals for the Ninth Circuit; however, they appealed the District Court's ruling on whether the State of California's domestic partnership registry preempts the Equal Benefits Ordinance. That appeal is pending.

V. Impact of the Ordinance [page 14]

Over the past five years, the country has witnessed a dramatic shift in the treatment of domestic partners, both in the workplace and elsewhere. There has been nearly a ten-fold increase in the number of employers offering domestic partner benefits. Currently, thirty-six percent of the Fortune 500 companies offer domestic partner benefits with that number increasing the closer the company is to the top of the Fortune list; fifty-eight percent of the Fortune 50 companies offer domestic partner benefits.

There has been a forty percent increase in the number of domestic partnership registries, and a significant expansion of the rights that come with registration. In Vermont, same-sex couples may form Civil Unions giving them all the rights conferred by the State on married couples (although no federal marriage rights are conferred). Domestic partners may now announce their relationships right alongside marriage announcements in over 144 newspapers including the *New York Times, Boston Globe, Los Angeles Times and Washington Post.*

In addition to San Francisco, eight other government bodies have enacted Equal Benefits Ordinances. Many more, including the key East Coast cities of New York and Atlanta, are considering such legislation, all using San Francisco's law as a model. As the number of Equal Benefits Ordinances continues to grow, more employers in a broader range of industries will

find that offering domestic partner benefits makes sense. In addition, the ripple effects felt in the insurance industry and among unions will continue to spread, causing more insurers to offer domestic partner insurance products and more unions to bring domestic partner benefits to the bargaining table.

In articulating the impact of the Equal Benefits Ordinance, perhaps the most significant fact to consider - but the hardest to quantify - is what it means to individual employees and their domestic partners to receive benefits equivalent to those given to married employees and their spouses. While it is easy to approximate the number of people employed by City contractors who are benefiting from domestic partner medical insurance (51,660), placing a value on this insurance coverage or any of the other benefits offered is much harder. The dollar amount paid for medical claims doesn't reflect the peace of mind gained by knowing that your partner will receive medical care when needed. The cost of a few days of paid bereavement leave doesn't include the value of the support provided to a domestic partner who is dealing with a death in their family. The dollar amount of retirement distributions doesn't reflect the comfort felt when structuring your retirement income to provide for the financial needs of your partner if you die first. Perhaps most importantly, any financial analysis of the impact of the Equal Benefits Ordinance can't include the added dignity felt when discriminatory treatment ends and you begin to receive equal pay for equal work.

Our union has always been supportive of securing employee benefits for its members but our Trust Fund wouldn't consider extending coverage to domestic partners until the San Francisco Equal Benefits Ordinance was passed. Now, domestic partner coverage is available to over 20,000 carpenters throughout Northern California.

Donna Levitt, Former Senior Field Representative, Carpenter's Local 22

[page 15]
Appendix A

Resource Materials

Resource materials available from the Human Rights Commission include:

Domestic Partner Registry Chart - provides an overview of domestic partnership registries across the United States; lists how to register, and the rights and responsibilities involved.

Corporate Mentors Program -a pool of corporate directors and human resources personnel who have completed the Equal Benefits compliance process and are willing to speak with representatives from other companies where domestic partner benefits and Equal Benefits compliance are being considered.

Equal Benefits Brochure - answers frequently asked questions and provides a list of resource materials and website address.

Insurance List - a reference guide to insurance companies from across the United States that are willing to write insurance policies inclusive of domestic partner coverage. The list currently includes companies in all fifty states and the District of Columbia.

Overview - a four page overview of the Equal Benefits Ordinance, compliance requirements, litigation challenges and available resources.

Quick Reference Guide to Equal Benefits Compliance - answers frequently asked questions and assists reader with completing basic forms and identifying documents required for compliance.

Resource Materials Booklet

- Fact Sheets - provides in-depth information on providing nondiscriminatory health insurance and pension plans to employees with spouses and employees with domestic partners, and the tax implications of doing so.

- Sample Policies - provides model language for employers looking to:
  - Create or modify leave and nondiscrimination policies
  - Establish an affidavit of domestic partnership
  - Explain the tax consequences of some domestic partners benefits

Rules of Procedure - implementation guidelines adopted by the Human Rights Commission that establish compliance criteria and provide useful information on a wide variety of compliance-related topics.

Compliance Reports -gives detailed summaries of the Commission's implementation efforts and compliance experience.

Website - found at *www.sfgov.org /sfhumanrights*, this site offers access to compliance forms, resource materials and the text of San Francisco Administrative Code Chapters 12B and 12C.

Endnotes

1. In 1972, San Francisco became the first government in the United States to pass a law barring discrimination on the basis of sexual orientation. (S.F. Administrative Code Chapter 12B.)

2. The term "domestic partner" is defined in the Ordinance as any person who has "a currently registered domestic partnership with a governmental body pursuant to state or local

law authorizing such registration." (S.F. Admin. Code Chapter 12b.1(c).) This includes both same-and opposite-sex couples.

3. "State of the Workplace" Human Rights Campaign 1999.

4. See page 11 for a discussion of the recent enhancement of the rights of domestic partners in California.

5. See page 10 for a list of jurisdictions with Equal Benefits Ordinances.

6. Of the pending contractors (which reflects 27% of the Declarations received to date), the vast majority (3,026) are pending because the contractor has not yet responded to the Commission's request for more information. The bulk of these contractors most likely are those that at one time sought to do business with the City but are no longer interested. (For instance, a company that bid on a contract but was not the successful bidder.)

7. The majority of these contractors have fewer than twenty employees in their workforce and offer no employee benefits.

8. An employee count currently is not available for 57 of the complying companies.

9. Statistics of U.S. Businesses (SUSB), U.S. Census Bureau, 1999.

10. Air Transport Association, et.al., v. City and County of San Francisco, et.al., 992 F.Supp.1149 (N.D. Cal. 1998).

11. See page 12 for a discussion of litigation challenges to the Equal Benefits Ordinance.

12. The vast majority of companies limiting compliance in both location and type of benefits offered are tenants at San Francisco International Airport.

13. Many compliant companies have multiple locations not reflected here. The numbers and locations reported reflect the mailing address information given by companies to the City and do not include branch offices where equal benefits also are provided.

14. The month of June 1997 has been incorporated into the first year of experience reflected on this table as well as in Fig. 11, below, to account for the fact that the Ordinance was enacted on June 1, 1997.

15. The authority to review waivers where there are no compliant companies, where the contractor is a governmental bulk purchasing agency, or to avoid use of a sham/shell company, was granted to the Human Rights Commission on December 22, 1997.

16. McKesson HBOC, Inc.

17. University of California, Raytheon Company, Electronic Data Systems, Avaya, Inc., and IBM.

18. Allegiance/Cardinal Healthcare, City of Daly City, South San Francisco Unified School District, City of San Bruno.

19. California Government Code Section 31780.2; City of Portland Code of Ordinances Chapter 13.6-34.

20. Equal Benefits Ordinances are in force in Berkeley, City of Los Angeles, Oakland and San Mateo County California, Seattle and Tumwater Washington. In addition, on July 1, 1998, the San Francisco Redevelopment Agency implemented contracting rules almost identical to those contained in the

Ordinance, and the San Francisco County Transportation Authority adopted a similar policy, which went into effect on July 1, 1999. Both of these bodies are quasi-state entities with commissioners or committee members appointed by the San Francisco Mayor or Board of Supervisors.

21. Broward County Code Article VI, Chapter 16½-157 (1999).

22. Chapter 347, H.P. 1256, L.D. 1703, Sec. 1.24 MRSA Section 2319-A, et. seq. (2001).

23. Atlanta's City Council passed a one-paragraph version of an Equal Benefits Ordinance on the last day of its 2001 session, which subsequently was vetoed by the Mayor.

24. Two of the state registries (Massachusetts and New York) are for state employees only. The other three are California, Hawaii and Vermont.

25. The West Hollywood, California registry, for example, allows registration by mail.

26. 992 F. Supp. 1149 (N.D. Cal 1998).

27. Only 33 companies comply on this basis.

APPENDIX J

Equal Benefits Four-Year Report - Oct. 25, 2001

Oct. 25, 2001

Virginia M. Harmon
Interim Director

Report prepared by:

Cynthia G. Goldstein, Equal Benefits Program Manager

with assistance from
other members of the staff of

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Appendix A. Resource Materials

[page 1] **I. Introduction**

On June 1, 1997, revisions to San Francisco Administrative Code chapters governing nondiscrimination in City contracts took effect, creating the first program of its kind in the United States designed to end discrimination in employee benefits for employees with domestic partners. Referred to as the Equal Benefits Ordinance, the law has played a significant role in dramatically increasing in the number of employers across the country offering domestic partner benefits. It has been the Human Rights Commission's charge to implement this historic legislation.

This report, which documents the fourth year of the Commission's implementation efforts, comes at a time when the number of registered domestic partnerships in the United States is at an all-time high. With an increase in the number of governmental domestic partnership registries and a more concerted effort by the U.S. Census Bureau to count unmarried couples, growth in the number of domestic partnerships cannot be disputed.(1)

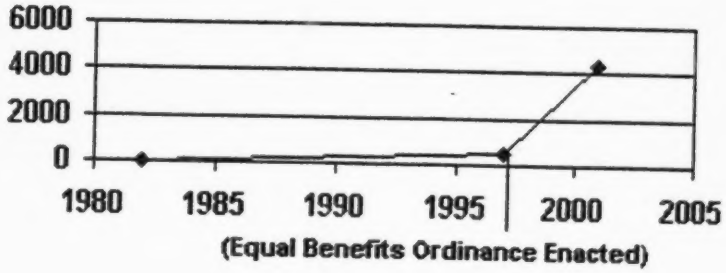
This past year has seen a steady increase in the number of compliant City contractors, and a decrease in the number of waivers utilized. Even though the economy has weakened, and the rush to recruit and retain employees has quieted, the number of private and public employers offering domestic partner benefits continues to grow as does the number of other Cities across the United States enacting Equal Benefits Ordinances in their jurisdictions.

II. Compliance Update

A. Employers Offering Domestic Partner Benefits in the United States

When the concept of domestic partner benefits was first introduced, only a handful of employers were willing to offer such benefits. From the first offering in 1982 until the introduction of the Equal Benefits Ordinance fifteen years later, only 500 companies extended domestic partner benefits to their employees. In the four years since the Ordinance took effect, that number has surged. As of the close of fiscal year 2000-2001, the Human Rights Commission has helped over 3,100 City Contractors extend benefits to the domestic partners of their employees. [page 2]

Employers Offering Domestic Partner Benefits Nationwide 1982-2001

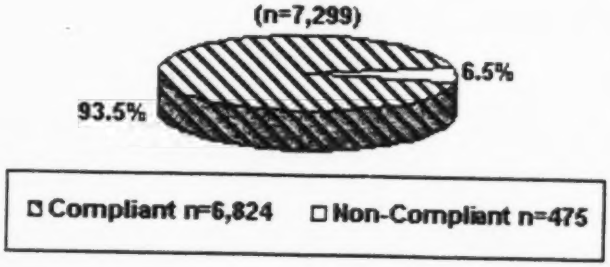


Nationwide, over 4,200 private employers have been documented as offering such benefits.

B. Complying Companies

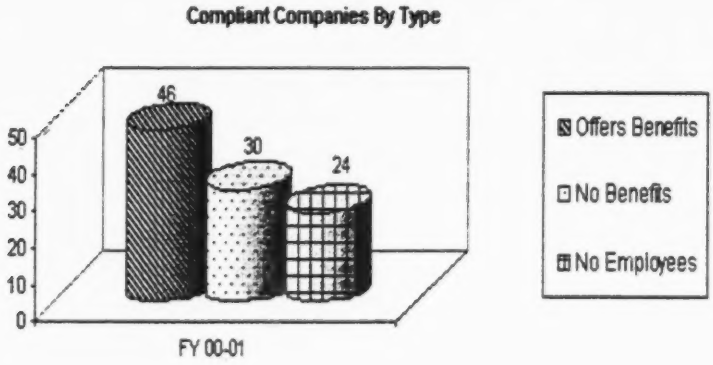
As of June 30, 2001, 10,110 contractors have submitted compliance paperwork to the Commission. Of those, the status of 7,299 has been finalized(2) and 6,824 (93.5%) have been placed into compliance (having ended any existing discrimination in the provision of benefits). Only 475 (6.5%) have been determined to be non-compliant.

Companies with Finalized Equal Benefits Status



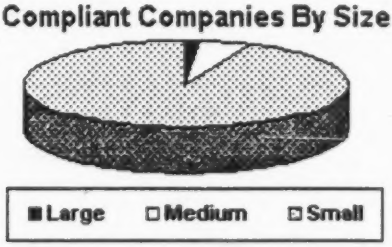
C. Compliance By Type

Contractors may comply with the Ordinance in one of three ways, by: (1) offering employee benefits that don't discriminate between spouses and domestic partners; (2) offering no employee benefits that extend to spouses or domestic partners (or to employees because they have a spouse or domestic partner); or (3) having no employees. Of the complying contractors, 3,157 (46%) offer nondiscriminatory benefits to their employees, 2,044 (30%) do not offer any benefits to their employees, (3) and 1,623 (24%) do not have any employees.



D. Company Size [page 3]

Forty-eight large companies (5,000 or more employees), 151 medium sized companies (500 to 4,999 employees) and 2,829 small companies (under 500 employees) comply by offering nondiscriminatory benefits. (4)



E. Employees Covered

City contractors offering domestic partner benefits employ a nationwide pool of approximately 1,476,000 people, reflecting an increase of almost 186,000 people in fiscal year 2000-2001. With actuarial statistics indicating an enrollment rate in domestic partner medical benefits offered to both same and opposite sex couples averaging 3% in the private sector, this means there are approximately 44,280 people who have taken advantage of this benefit through the programs offered by City contractors. This is an increase of approximately 5,580 insured people in the past year alone. (5)

F. Companies Limiting Compliance

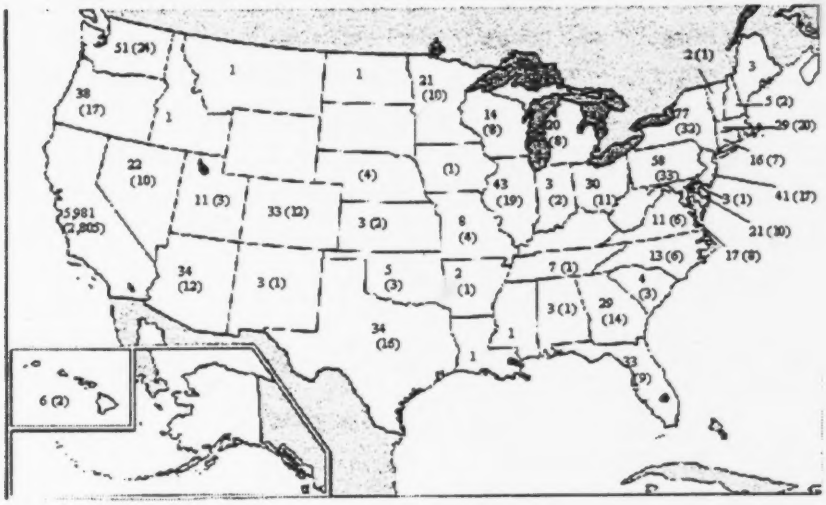
In April 1998, a U.S. District Court ruling (6) changed the scope of the Ordinance by allowing companies to limit their compliance geographically and allowing some companies to limit which benefits they offer in a nondiscriminatory manner. Since this ruling, only 77 companies have elected to comply on a limited basis by continuing to discriminate in certain locales or with respect to certain benefits. This reflects an increase of only 19 companies in the past year. Companies complying on a limited basis comprise just slightly more than 1% of the total number of complying companies (which includes those offering nondiscriminatory benefits as well as those not offering benefits or having no employees), and only 2.4% of complying companies that offer benefits. Forty-seven of these companies have limited the geographic reach of their compliance; two have limited the benefits offered and twenty-seven have limited both. (7)

[page 4] G. Geography

Complying companies are located in at least 44 states plus the District of Columbia and in almost 900 cities across the country. (8) Approximately 87% are located in California and 41% in San Francisco. Companies that comply by offering

nondiscriminatory benefits can be found in at least 39 states and the District of Columbia.

Number of Complying Companies in Each State (9)



H. Waivers and Exceptions

Unfortunately, there are some instances when the City has no choice but to contract with a company that refuses to end its discriminatory behavior. To allow the City to continue to conduct needed business where there are no contractors willing to comply, the Ordinance includes the opportunity for City departments to request that waivers be applied in certain circumstances. Use of the majority of these waivers is contingent upon an effort to get the prospective contractor to comply and on the Human Rights Commission's review and approval.

[page 5] Waivers are permissible where:

- there is only one source for a needed good or service or only one party with an interest in real property;

- there is an emergency that threatens public health or safety;

- a public entity offers the City needed goods or services of a quality or accessibility that is unavailable from another source;

- there are multiple sources for a needed good, service or interest in real property but none is willing to comply;

- a transaction entered into through a bulk purchasing arrangement established by a governmental or regional entity would actually reduce the City's purchasing costs and would be in the City's best interest;

- it is necessary to avoid conducting business with an entity that was set up or is being used for the purpose of evading the intent of the Ordinance.

Since the Ordinance became effective, the total number of waivers used each year has slowly declined. In the fourth year of implementation, City departments requested a total of 1,232 waivers, 1,216 of which were approved.

Sole Source
293 approved
10 denied
3 withdrawn

Public Entity
26 approved
1 denied

Sham/Shell Entity
0 approved

Blanket Sole Source
840 approved (10)

Bulk Purchasing Arrangement
1 approved

Multiple Non-compliant Prospective Contractors
54 approved
2 denied

Emergency
2 approved

[page 6] **III. Legislative Update**

A. Contracting Legislation

In the past year, San Mateo County and the Cities of Berkeley, California and Tumwater, Washington have enacted Equal Benefits measures that are largely similar to San Francisco's law. They join the cities of Los Angeles and Seattle that had enacted similar measures in the previous year. (11) Other cities have contacted the Commission for information as they consider enacting Equal Benefits Ordinances. These include the neighboring City of Oakland, California, as well as Atlanta, Georgia, which has become the first city outside of the West to introduce such a measure. (12)

B. Domestic Partnership Registries

The number of governmental domestic partner registries also continues to increase. At least a dozen new registries have been created in the past year, raising the total number to 61 registries in 21 states. Some of these registries allow partnerships to be formed even when neither partner lives or works in the jurisdiction (which is similar to most marriage laws). This means that it is possible for couples to register even if there is no registry in their city or state. (13)

C. California Domestic Partnership Legislation

In the past year, the California legislature considered several bills that would have significantly enhanced the rights of domestic partners within the State. Recently, Governor Gray Davis signed one such measure, Assembly Bill 25. This new law, which goes into effect on January 1, 2002, will offer a variety of new legal protections and benefits for domestic partners in California. Those most pertinent to the workplace include the exemption of domestic partner health insurance benefits from state income taxation, the right to use employer-sponsored sick leave to care for an ill domestic partner or child of a domestic partner, and the requirement that health insurers doing business in California offer domestic partner coverage whenever spousal coverage is offered. In addition, this measure changes the statewide domestic partner registry so that opposite-sex couples may register where at least one partner is over the age of 62. (Previously, both partners in an opposite-sex couple were required to meet this age requirement.)

[page 7] **IV. Litigation Update**

Successes have been achieved in the past year in both of the lawsuits challenging the Ordinance. (14) The U.S. Court of Appeals for the Ninth Circuit issued opinions in both cases in the City's favor. In both matters, the Court remanded to the trial court the question of whether the California domestic partnership registry preempts the Equal Benefits Ordinance. That matter is still pending before the U.S. District Court. United Airlines and the other members of the Air Transport Association (ATA) recently filed a petition to have the Circuit Court's decision reheard. If this petition is denied, it is possible that the ATA will petition to be heard by the U.S. Supreme Court.

V. Impact of the Ordinance

The impact of the San Francisco Equal Benefits Ordinance is being felt across the United States, transforming the concept of domestic partner benefits from a cutting-edge employee benefit to more of a mainstay. Included among the four thousand-plus companies extending domestic partner benefits in the United States are over one hundred and fifty Fortune 500 companies. This represents thirty percent of the largest companies in the United States and includes 42 companies that have added domestic partner benefits during this calendar year alone.

As Equal Benefits Ordinances are enacted in other cities, the positive impact created by San Francisco's model will continue to expand. Once cities outside of the West Coast begin implementing this type of legislation, the number of companies offering domestic partner benefits will likely experience another surge. For companies engaged in municipal contracting, the cost of discriminating will continue to mount as more and more cities enact Equal Benefits measures and subsequently place potential contract dollars out of reach.

While it is easy to quantify the number of people employed by City contractors who are benefitting from domestic partner medical insurance, the positive impact of having access to other workplace benefits is much less tangible. Yet there is great value derived by employees with domestic partners who know they are entitled to the same benefits as their married coworkers if they need time off work to care for or grieve over a domestic partner. Likewise, having the same retirement options and being able to enjoy the same company perks as married coworkers, such as the valuable flight discounts given by many airlines to their employees, is also of real value to employees. Offering all of these benefits helps create an environment where employees are paid equally for the work they perform and where employees can feel respected for who they are and for the types of families to which they belong.

[page 8]
Appendix A

Resource Materials

Domestic Partner Registry Chart - provides an overview of domestic partnership registries across the United States; lists how to register, and the rights and responsibilities involved.

Corporate Mentors Program -a pool of corporate directors and human resources personnel who have completed the Equal Benefits compliance process and are willing to speak with representatives from other companies where domestic partner benefits and Equal Benefits compliance are being considered.

Equal Benefits Brochure - answers frequently asked questions and provides a list of resource materials and website address.

Insurance List - a reference guide to insurance companies from across the United States that are willing to write insurance policies inclusive of domestic partner coverage. The list currently includes companies in all fifty states and the District of Columbia.

Overview - a four page overview of the Equal Benefits Ordinance, compliance requirements, litigation challenges and available resources.

Quick Reference Guide to Equal Benefits Compliance - answers frequently asked questions and assists reader with completing basic forms and identifying documents required for compliance.

Resource Materials Booklet

- Fact Sheets - provides in-depth information on providing nondiscriminatory health insurance and pension plans to

employees with spouses and employees with domestic partners, and the tax implications of doing so.

- Sample Policies - provides model language for employers looking to:
  -Create or modify leave and nondiscrimination policies
  -Establish an affidavit of domestic partnership
  -Explain the tax consequences of some domestic partners benefits

Rules of Procedure - implementation guidelines adopted by the Human Rights Commission that establish compliance criteria and provide useful information on a wide variety of compliance-related topics.

Compliance Reports - issued at six months, two, three and four years. These reports give detailed summaries of the Commission's implementation efforts and compliance experience.

Website - found at *www.ci.sf.ca.us/sfhumanrights* this site offers access to compliance forms, resource materials and the text of San Francisco Administrative Code Chapters 12B and 12C.

Endnotes

1. The 2000 Census noted the presence of same-sex domestic partnerships in all but 22 counties in the entire United States.

2. Of the 2,811 contractors whose status is still pending (which reflects 28% of the Declarations received to date), the vast majority (2,775) are pending because the contractor has not yet responded to the Commission's request for more information. The bulk of these pending contractors are likely to be those who at one time sought to do business with the City but who no longer are interested. (For instance, a company that bid on a contract but was not the successful bidder.)

3. The majority of these contractors have fewer than twenty employees in their workforce.

4. An employee count currently is not available for 129 of the complying companies.

5. Use of non-insurance benefits, such as bereavement leave, family medical leave, company discounts (including flight discounts used by airline employees) and others, is not reflected in this figure.

6. Air Transport Association, et.al., v. City and County of San Francisco, et.al., 992 F.Supp.1149 (N.D. Cal. 1998).

7. The vast majority of companies limiting compliance in both location and type of benefits offered are tenants at San Francisco International Airport.

8. Many compliant companies have multiple locations not reflected here. The numbers and locations reported reflect the mailing address information given by companies to the City and do not include branch offices where equal benefits also are provided.

9. Numbers without parentheses indicate the total number of compliant companies in each state; numbers within parentheses indicate compliant companies offering nondiscriminatory benefits. The slight variation in the numbers reflected here as compared to the compliance statistics above is due to the foreign vendors not reflected in this chart.

10. The Blanket Sole Source form was designed to assist the City in processing requests for sole source waivers where the type of contract at issue is always a sole source and is a routine transaction. This past year, such forms were filed by 28 departments.

11. In addition, the San Francisco Redevelopment Agency implemented contracting rules almost identical to those contained in the Ordinance on July 1, 1998 and the San Francisco County Transportation Authority adopted a similar policy, which went into effect on July 1, 1999. Both of these bodies are quasi-state entities with Commissioners or committee members appointed by the San Francisco Mayor or Board of Supervisors.

12. Broward County, Florida, enacted a provision in 1999, which gives an advantage in bidding to businesses offering domestic partner benefits.

13. The West Hollywood, California registry, for example, allows registration by mail.

14. The two lawsuits currently challenging the Equal Benefits Ordinance were filed by the Air Transport Association, on behalf of the nation's largest airlines, and S.D. Myers, Inc., an Ohio-based company whose suit is sponsored by the American Center for Law and Justice, a legal group founded by anti-gay Christian Coalition leader Pat Robertson.

APPENDIX K

Equal Benefits Three-Year Report - Aug. 10, 2000

Aug. 10, 2000

Virginia M. Harmon
Interim Director

Report prepared by:
Cynthia G. Goldstein, Equal Benefits Program Manager

with assistance from
other members of the staff of

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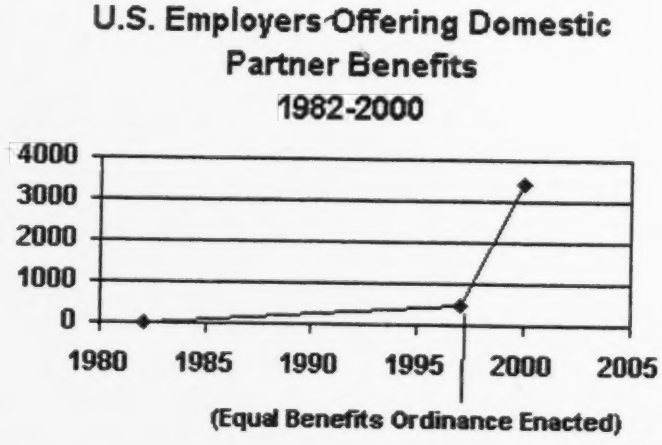
[page 1] **EXECUTIVE SUMMARY**

On June 1, 1997, revisions to San Francisco Administrative Code chapters governing nondiscrimination in City contracts took effect, creating the first program of its kind in the United States designed to end discrimination in employee benefits for employees with domestic partners. Referred to as the Equal Benefits Ordinance, the law has played a significant role in the dramatic increase in the number of employers across the country offering domestic partner benefits. It also has helped to firmly plant domestic partner benefits on the employee compensation landscape.

Significant Developments

The number of employers offering domestic partner benefits is rising rapidly. In 1982, The Village Voice newspaper became the first employer in the U.S. to offer domestic partner benefits.

Fifteen years later, when the Equal Benefits Ordinance took effect, approximately 500 companies nationwide had implemented such plans. Today, nearly 20% of Fortune 500 companies offer domestic partner health benefits and the Human Rights Commission has helped nearly 2,800 City Contractors to do so as well. A recent report issued by the Human Rights Campaign(1) counted 3,402 companies offering domestic partner benefits across the country. The report attributed 76% of that total to companies complying with the San Francisco Equal Benefit Ordinance.



Other cities are taking our lead. In the past year, the Cities of Los Angeles and Seattle have enacted Equal Benefits measures that are largely similar to San Francisco's law. The Los Angeles law became effective on January 1, 2000 and unlike San Francisco or Seattle, it extends its reach to include subcontractors. The Seattle ordinance has an effective date of September 30, 2000 and applies to a slightly smaller pool of contracts than the other laws in that it excludes contracts estimated to cost less than $33,000.

The Human Rights Commission has had the opportunity to advise both jurisdictions as they design and begin to implement their programs. The Commission has shared both its [page 2] experience addressing the multitude of decisions and circumstances presented by the legislation, as well as the

educational materials, Rules of Procedure and forms developed for San Francisco's use.

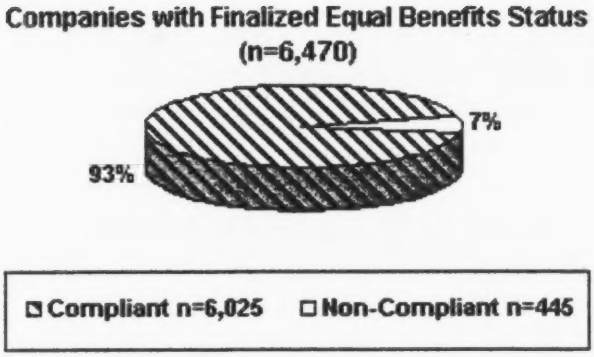
Despite fifteen months of opportunity, only 58 companies have chosen to limit their compliance. In April 1998, a U.S. District Court ruling(2) changed the scope of the Ordinance by allowing companies to limit their compliance geographically and allowing some companies to limit what benefits they offered in a nondiscriminatory manner. Since this ruling, only 58 companies have elected to comply on a limited basis and continue discriminating in certain locales or with respect to certain benefits. This represents less than 1% of the total number of companies complying with the Ordinance.

Major airlines are now in compliance. Since the July 1999 Court decisions requiring compliance from airlines leasing space at San Francisco International Airport, the Commission has been working to move the first set of plaintiffs, a collection of the nation's largest airlines, into compliance. Because the Airport's new international terminal is slated to open in September 2000, lease and permit agreements with the airlines occupying space in that terminal must be renegotiated. To date, nineteen airlines comply, including 17 of the 22 carriers slated to occupy the new terminal. This includes United Airlines, the largest airline in the world.

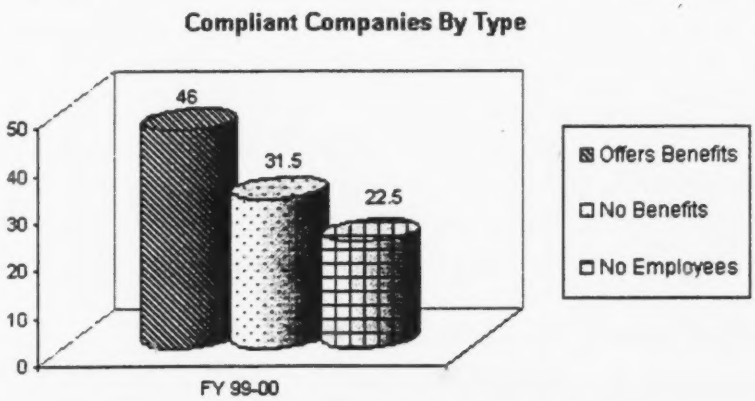
Compliance Update

The following is an update of the compliance statistics reported for the past year of implementation (Fiscal Year 1999-2000).

Companies complying. Of the 6,470 compliance declarations that have been fully reviewed, 93% comply with the requirements of the Equal Benefits Ordinance. The percentage of complying companies compared to those fully reviewed has improved slightly (+2%) since the first report on the Ordinance was issued in January 1998, and has remained constant over the past year.



[page 3] *Compliance by type*. City contractors may comply with the Ordinance in one of three ways: (1) offer employee benefits that don't discriminate between spouses and domestic partners; (2) offer no employee benefits that extend to spouses or domestic partners (or to employees because they have a spouse or domestic partner); or (3) by having no employees. To date, out of all complying companies, 46% comply by offering nondiscriminatory benefits, 31.5% comply by offering no employee benefits, and 22.5% comply because they have no employees.



Employees covered. City contractors offering domestic partner benefits employ a nationwide pool of approximately 1,290,000 people, an increase of almost 300,000 people in the past year. With actuarial statistics showing an enrollment rate in private sector domestic partner medical benefits averaging three

percent, that means there are approximately 38,700 people now covered by employer-sponsored medical insurance plans as a result of the Equal Benefits Ordinance, including approximately 8,700 new domestic partners added in the past year.

Geography. Complying companies are found in at least 44 states and in almost 800 cities across the country. Approximately eighty-seven percent are located in California and 41% in San Francisco. Similarly, there has been an increase in the number of governmental domestic partner registries. At least a dozen new registries have been created in the past year, raising the total number to 56 registries in 20 states.

[page 4] **I. Introduction**

When looking at the growing national trend toward offering employees domestic partner benefits, it is helpful to consider the reasons why companies might decide to do so. Besides seeking City contracting opportunities, for some companies it is a matter of fairness. A 1992 U.S. Census Bureau study estimated that 37-40% of all employee compensation comes in the form of benefits. Census Bureau information also indicates that the number of unmarried-couple households increased from 1.6 million in 1980 to 4.2 million in 1998.(3) Recognizing the changing composition of the workforce, some employers realize that to truly provide equal pay for equal work they must equalize the value of benefits offered to employees. Offering benefits for domestic partners takes a giant step in this direction.

Employers, competing for employees in today's tight job market, recognize that domestic partner benefits can be a useful recruitment tool. A study conducted in 1999 by the Society for Human Resource Management found that offering domestic partner benefits was the most effective incentive for recruiting executives and the third most effective recruitment tool when hiring managers and line workers. This study supports what

many companies have come to realize: one way to attract and retain talented employees is to offer them a competitive benefits package. They also realize that employee retention lowers turnover and recruitment costs, and helps improve employee job satisfaction and performance. Even employees that may not seek to take advantage of domestic partner benefits often look for the inclusion of such benefits as a sign that an employer is committed to providing the most comprehensive and competitive benefits package.

Companies also understand that the U.S. workforce is increasingly diverse and that employees come from a wide variety of family structures. Many employees place a high value on their employer's commitment to diversity and will look for that commitment when choosing where to work. The inclusion of domestic partner benefits in an employer's benefits package demonstrates a commitment to diversity and sends a message to all employees that their unique qualities and individual circumstances are appreciated.

While corporations sometimes fear that offering domestic partner benefits may negatively impact their bottom line, this fear has not been the proven reality. To the contrary, not only do actuarial data dispel those fears, companies now are recognizing the potential of marketing to the lesbian gay bisexual transgender (LGBT) community. Many LGBT consumers, in turn, will look to corporate policies when deciding where to spend their dollars. Companies demonstrating a commitment to their LGBT employees (by offering domestic partner benefits and including sexual orientation and gender identity in anti-discrimination policies) will likely be favored by LGBT consumers.

[page 5] **II. Compliance Update**

A. Compliance Statistics

As of June 30, 2000, 9,065 contractors have submitted compliance paperwork to the Commission. Of those, the status of 6,470 has been finalized(4) and 6,025 (93.1%) have been placed into compliance (having ended any existing discrimination in the provision of benefits). Only 445 (6.9%) have been found to be out of compliance. Of the complying contractors, 2788 (46.3%) offer nondiscriminatory benefits to their employees, 1889 (31.3%) do not offer any benefits to their employees,(5) and 1348 (22.4%) do not have any employees.

These statistics reflect companies complying throughout their U.S. operations that have ended discrimination in the full array of benefits offered. Compliance information for companies that have limited their compliance geographically or have limited the benefits offered in a nondiscriminatory manner (as allowed by an April 1998 District Court ruling)(6) is captured separately. In the fifteen months since that ruling changed compliance requirements, only 58 companies have elected to comply on a limited basis and continue discriminating in certain locales or with respect to certain benefits. This represents less than 1% of the total number of companies complying with the Ordinance. Forty of these companies have limited only the geographic reach of their compliance; one has limited just the benefits offered and seventeen have limited both.

B. Covered Employees

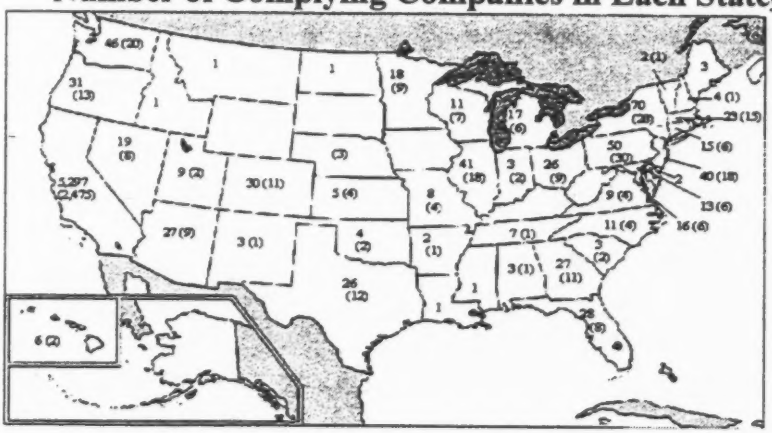
Contractors offering nondiscriminatory benefits employ approximately 1,290,000 individuals nationwide, reflecting an increase in one year of nearly 300,000 people. With actuarial statistics indicating an enrollment rate in domestic partner medical benefits offered to both same and opposite sex couples averaging 3% in the private sector, this means that nearly

38,700 domestic partners have taken advantage of this benefit through the programs offered by City contractors. This is an increase of approximately 8,700 insured people in the past year alone. (7)

[page 6] C. Geography

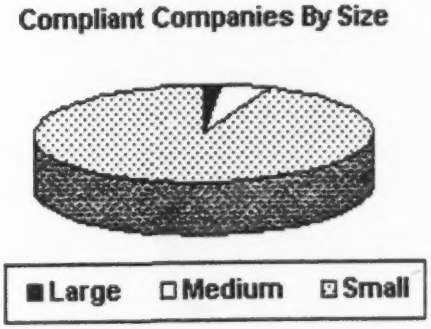
Complying companies may be found in at least 44 states and the District of Columbia, and in almost 800 cities across the country.(8) Approximately eighty-seven percent are located in California and 41% in San Francisco. Companies offering nondiscriminatory benefits can be found in at least 37 states and the District of Columbia.

Number of Complying Companies in Each State(9)



D. Company Size

Forty-one large companies (5,000 or more employees), 135 medium sized companies (500 to 4,999 employees) and 2,440 small companies (under 500 employees) comply by offering nondiscriminatory benefits.(10)



[page 7] E. Insurance Industry Response

The Ordinance continues to have a positive impact on the availability of domestic partner insurance across the country. In 1997, when the Ordinance first went into effect, the Commission was able to identify only 14 insurance providers willing to offer domestic partner coverage to their customers. Currently, the Commission's count is close to 150 companies offering insurance products inclusive of domestic partners.(11) In addition to an increase in the number of providers, the Commission has seen an increase in the number of states in which these providers will issue policies inclusive of domestic partners. These providers also are more willing to write policies for smaller employers. While this growth has dramatically improved the ease with which companies may offer domestic partner insurance benefits, more growth is needed in this area. There remain areas of the country where employers have difficulty finding insurance products inclusive of domestic partners. This is especially true for smaller employers, who don't have the buying power of their larger counterparts.

F. Union Response

Because many employees receive benefits through their collective bargaining agreements or through union trust funds, contractors and the Commission have tried to persuade unions

to include domestic partner benefits in their agreements. To date, at least 40 unions have changed their policies to include domestic partner coverage. This includes several national unions affiliated with the automobile manufacturing industry and the airline industry.

G. Waivers and Exceptions

Unfortunately, there are some instances when the City has no choice but to contract with a company that refuses to end its discriminatory behavior. To allow the City to continue to conduct needed business where there are no contractors willing to comply, the Ordinance includes the opportunity for City departments to request that waivers be applied in certain circumstances. Use of the majority of these waivers is contingent upon an effort to get the prospective contractor to comply and on the Human Rights Commission's review and approval.

Waivers are permissible where:

- there is only one source for a needed good or service or only one party with an interest in real property;
- there is an emergency that threatens public health or safety;

[page 8]

- a public entity offers the City needed goods or services of a quality or accessibility that is unavailable from another source;
- there are multiple sources for a needed good, service or interest in real property but none is willing to comply;
- a transaction entered into through a bulk purchasing arrangement established by a governmental or regional entity would actually reduce the City's purchasing costs and would be in the City's best interest;
- it is necessary to avoid conducting business with an entity that was set up or is being used for the purpose of evading the intent of the Ordinance.

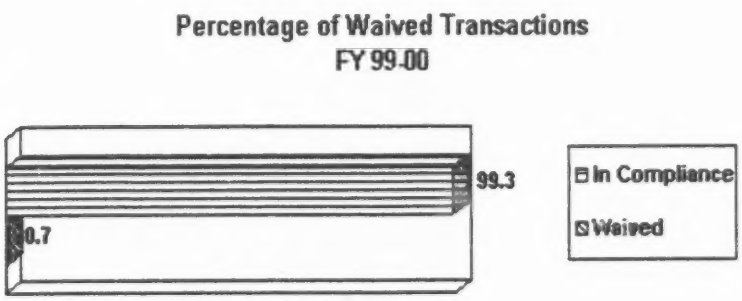
Since the Ordinance became effective, the total number of waivers used each year has remained fairly steady. In the third year of implementation, City departments requested a total of 1,389 waivers, 1,371 of which were approved.

Sole Source	Public Entity	Sham/Shell Entity
282 approved 14 denied 2 withdrawn	40 approved	0 approved

Blanket Sole Source	Bulk Purchasing Arrangement	Multiple Non-compliant Prospective Contractors
956 approved(12	1 approved	90 approved 2 withdrawn

Emergency
2 approved

While the Commission continues its efforts to reduce the number of waivers granted each year, the number granted is low when compared to the total number of contracts entered into by the City. In the past fiscal year, the City entered into approximately 187,575 transactions(13) covered by the Ordinance. Only .7% of these transactions were entered into pursuant to a waiver.



[page 9] **III. Legislative Update**

A. Contracting Legislation

In addition to locally-based agencies that have adopted provisions similar to the Equal Benefits Ordinance,(14) and the somewhat different version in place in Broward County, Florida,(15) in the past year, the Cities of Los Angeles and Seattle have enacted Equal Benefits measures. The Los Angeles law became effective on January 1, 2000. It is largely similar to the San Francisco version, with one significant exception: it includes subcontractors in its provisions. The Seattle law becomes effective on September 30, 2000 and applies to a slightly smaller range of contracts in that it excludes contracts estimated to cost less than $33,000. (16)

Other cities around the country are evaluating and pursuing the enactment of legislation similar to the Equal Benefits Ordinance. The Human Rights Commission is working with community members to prepare written materials that will aid other jurisdictions as they analyze, enact and implement similar measures. In addition, the Commission is meeting with elected officials and community members from other jurisdictions to assist them in this process.

B. Domestic Partnership Registries

Since the Equal Benefits Ordinance was enacted, there has been a marked increase in the number of domestic partner registries around the country. Today, there are at least 56 registries available in 20 states. Some of these registries allow partnerships to be formed even when neither partner lives or works in the jurisdiction (which is similar to many marriage laws). This means that it is possible for couples to register even if there is no registry in their city or state. San Francisco's registry, which is restricted to couples where at least one partner lives or works in San Francisco, has registered 6,570 partnerships since its inception in 1990. Of those, 550 have

been officially dissolved leaving 6,020 currently registered partnerships.

[page 10] C. California Domestic Partnership Legislation

In the past year, the California legislature considered several bills that would have significantly enhanced the rights of domestic partners within the State. Measures considered and acted on during the 1999-2000 session are described in Appendix B.(17) The most significant legislative change that took place was the establishment of a statewide domestic partnership registry for same-sex couples, and opposite-sex couples where both partners are over age 62. Since January 1, 2000, when the State registry opened its doors, 4,497 couples have registered their partnerships.

D. Vermont Civil Unions Legislation

Three same-sex couples who had been denied marriage licenses sued the state of Vermont for violating the Common Benefits Clause of the Vermont Constitution. On December 20, 1999, the Vermont Supreme Court ruled that the state must provide equal protections and rights to same-sex couples. However, the Court did not mandate legalized same-sex marriage; instead it ordered the legislature to either legalize same-sex marriage or develop a system to ensure same-sex couples receive the comprehensive state benefits afforded to opposite-sex couples. The legislature responded by passing a Civil Union law on April 26, 2000. As of July 1, 2000, same-sex couples can apply for a civil union license and thereby receive the same state law protections and responsibilities that spouses receive upon marriage.

IV. Litigation Update

Little change has taken place in the past year in the status of the two remaining lawsuits challenging the Ordinance.(18) Both have been briefed and are awaiting oral argument before the

U.S. Court of Appeals for the Ninth Circuit. In the meantime, the Commission is working with staff from the Airport to move the first set of plaintiffs, a collection of the nation's largest airlines, into compliance as required by the District Court decisions. As the Airport's new international terminal gets ready to open in September 2000, lease and permit agreements with the airlines occupying space in that terminal must be renegotiated. This allows for the Equal Benefits Ordinance to come into play. Presently, nineteen airlines have come into compliance. While the Court eliminated the requirement that airlines (when leasing space at the Airport) offer nondiscriminatory medical and pension benefits, other [page 11] benefits, including discount travel, bereavement leave and family medical leave, are being extended to domestic [page 12] partners. Some airlines, including United Airlines, the largest airline in the world, have voluntarily extended medical and pension benefits to the (same-sex) domestic partners of their employees. Nevertheless, they continue to appeal the Court's ruling.

V. Impact of the Ordinance

The employee benefits landscape has been forever changed as a result of the Equal Benefits Ordinance. Offering domestic partner benefits is becoming commonplace among employers across the nation and studies reflect the high value employees place on receiving them. Labor unions and insurance providers are stepping up their support for domestic partner benefits. In the thirty-seven months since the law went into effect, a new insurance market has been created to which nearly 150 insurers from across the country have responded. Unions, both local and national, are advocating for the inclusion of domestic partner benefits as part of their bargaining packages.

The number of people employed by City contractors offering domestic partner benefits easily tops one million, meaning that approximately 38,700 domestic partners receive medical insurance coverage as a result. Even more employees can go to

work each day knowing that they are entitled to the same benefits as their married coworkers if they need time off work to care for or grieve over a domestic partner. Likewise, they know they can enjoy the same company perks as their married coworkers, such as the valuable flight discounts given by many airlines to their employees.

With equal benefits ordinances coming into effect in other cities, the positive impact created by San Francisco's model is rapidly expanding. This expansion is likely to increase pressure on companies still resistant to compliance. Discriminating companies may be willing for forfeit the contracting dollars previously reaped from business with San Francisco, but the costs of discriminating begin to mount when contract dollars from Los Angeles, Seattle and perhaps other cities are subtracted from the bottom line.

[page 12]
Appendix A

Twenty Largest Complying Companies

Name of Company	No. of Employees
1. Bank of America	168000
2. Wells Fargo Bank/Norwest Bank	100000
3. Merrill Lynch Capital Markets	53000
4. Chase Manhattan Bank	51000
5. Pacific Bell	45000
6. Laidlaw Transit	44000

7. IKON Office Solutions	40000
8. Xerox Corporation	40000
9. Hewlett-Packard	38000
10. Salomon Smith Barney	35000
11. US Bankcorp	30000
12. Agilent Technologies	27000
13. Digital Equipment Corp	26000
14. Science Applications International	25000
15. Pacific Gas & Electric	21000
16. SmithKline Beecham	20000
17. KPMG Peat Marwick	19000
18. Argenbright Securities	15000
19. Danka Corporation	15000
20. State Street Corporation	13000

[page 14]
Appendix B

State of California Domestic Partner Legislation

- SB 75 (Murray)
  - Would establish a state-wide domestic partnership registry for same sex couples, provide health facility visitation rights to domestic partners, and provide domestic partners eligibility for health insurance benefits through the Public Employees Retirement System.
  - *Vetoed* by Governor Davis on October 2, 1999.

- SB 118 (Hayden)
  - Would expand the California Family Care and Medical Leave Act by allowing employees time off to care for an "individual who depends on the employee for immediate care and support."
  - *Vetoed* by Governor Davis on May 23, 2000.

- SB 1410 (Speier)
  - Would allow death and survivor benefits to be paid to the surviving domestic partners of San Mateo County employees.
  - *Pending* Assembly floor vote.

- AB 26 (Migden)
  - Would establish a domestic partner registry for same-sex couples, and opposite-sex couples where both partners are over the age of 62.
  - *Enacted* into law October 10, 1999.

- AB 1990 (Romero)
  - Would authorize domestic partners to make medical treatment decisions on behalf of the other partner.
  - *Inactivated* and merged with AB 2211 into AB 2047.

- AB 2047 (Romero, Kuehl, Migden, Steinberg)
  - Would allow domestic partners to make medical decisions for an incapacitated partner, to inherit without a will, to be appointed administrator of the deceased partner's estate, to make funeral arrangements, and to request an autopsy. Would also add domestic partners to conservatorship laws and would list domestic partners on the statutory will form.
  - *Stalled* in Assembly Appropriations Committee.

- AB 2211 (Kuehl)
  - Would allow domestic partners to file wrongful death and negligence suits, request an autopsy, and would add domestic partner to existing conservatorship and statutory will laws.
  - *Inactivated* and merged with AB 1990 into AB 2047.

- AB 2421 (Migden)
  - A clean-up bill that would allow an opposite-sex couple to apply for domestic partnership as long as at least one partner is over the age of 62.
  - *Pending* in Senate Appropriations Committee.

[page 15]
Appendix C

Resource Materials

Domestic Partner Registry Chart – provides overview of domestic partnership registries across the United States; lists how to register, rights and responsibilities involved.

Corporate Mentors Program –a pool of corporate directors and human resources personnel who have completed the Equal Benefits compliance process and are willing to speak with representatives from other companies where domestic partner benefits and Equal Benefits compliance are being considered.

Equal Benefits Brochure – answers frequently asked questions and provides list of resource materials and website address.

Insurance List – a reference guide to insurance companies from across the United States that are willing to write insurance policies inclusive of domestic partner coverage. The list currently includes companies in all fifty states and the District of Columbia.

Overview – a four page overview of the Equal Benefits Ordinance, compliance requirements, litigation challenges and available resources.

Quick Reference Guide to Equal Benefits Compliance – answers frequently asked questions and assists reader with completing basic forms and identifying documents required for compliance.

Resource Materials Booklet

- Fact Sheets – provides in-depth information on providing nondiscriminatory health insurance and pension plans to

employees with spouses and employees with domestic partners, and the tax implications of doing so.

- Sample Policies – provides model language for employers looking to:
  -Create or modify leave and nondiscrimination policies
  -Establish an affidavit of domestic partnership
  -Explain the tax consequences of some domestic partners benefits

Rules of Procedure – implementation guidelines adopted by the Human Rights Commission that establish compliance criteria and provide useful information on a wide variety of compliance-related topics.

Six Month Report – issued January 6, 1998, this report gives a detailed summary of the Commission's implementation efforts and the compliance experience of the Ordinance's first six months.

Two Year Report – issued August 12, 1999, this report provides a brief history of the Ordinance and describes the compliance experience of the first two years of implementation.

Website – found at www.ci.sf.ca.us/sfhumanrights this site offers access to compliance forms, resource materials and the text of San Francisco Administrative Code Chapters 12B and 12C.

Endnotes

1. The Human Rights Campaign is a national lesbian and gay political organization based in Washington, D.C.

2. Air Transport Association, et.al., v. City and County of San Francisco, et.al., 992 F.Supp.1149 (N.D. Cal. 1998).

3. This figure is incomplete in that it does not include same-sex couples.

4. Of the 2,595 contractors whose status is still pending (which reflects 28.63% of the Declarations received to date), the vast majority (2,538) are pending because the contractor has not yet responded to the Commission's request for more information. With new Declarations received each week, some pending contractors will exist at any given time. This means that the overall percentage of pending contractors has decreased over 2.5% in the past year, despite the fact that an additional 1060 declarations have been filed.

5. The majority of these contractors have fewer than twenty employees in their workforce.

6. Air Transport Association, et.al., v. City and County of San Francisco, et.al., 992 F.Supp.1149 (N.D. Cal. 1998).

7. Use of non-insurance benefits, such as bereavement leave, family medical leave, company discounts (including flight discounts used by airline employees) and others, is not reflected in this figure.

8. Many compliant companies have multiple locations not reflected here. The numbers and locations reported reflect the mailing address information given by companies to the City and do not include branch offices where equal benefits also are provided.

9. Numbers without parentheses indicate total number of compliant companies in each state; numbers within parentheses indicate compliant companies offering nondiscriminatory benefits. The slight variation in the numbers reflected here as compared to the compliance statistics above is due to the foreign vendors not reflected in this chart.

10. An employee count currently is not available for all companies. A list of the twenty largest compliant companies that offer benefits is attached as Appendix A to this report.

11. In addition to medical insurance (covering health, dental and vision care) insurance products available to domestic partners also include dependent life insurance, accidental death and disability insurance products.

12. The Blanket Sole Source was designed to assist the City in processing requests for sole source waivers where the type of contract at issue is always a sole source and is a routine transaction. This past year, such forms were filed by 27 departments.

13. This number is incomplete in that it does not include property contracts also covered by the Ordinance.

14. On July 1, 1998, the San Francisco Redevelopment Agency implemented contracting rules almost identical to those contained in the Ordinance. On May 17, 1999, the San Francisco County Transportation Authority adopted a similar policy, which went into effect on July 1, 1999. Both of these bodies are quasi-state entities with Commissioners or committee members appointed by the San Francisco Mayor or Board of Supervisors.

15. Broward County's provision, which was enacted in 1999, gives an advantage in bidding to businesses offering domestic partner benefits.

16. The Los Angeles law excludes contracts for less than $5,000 and the San Francisco version exempts companies from complying where the City spends less than $5,000 with the company per year. A chart comparing the three city ordinances is available from the Human Rights Commission.

17. This list is current as of August 8, 2000. Because the legislative session does not end until August 31, 2000, other bills may be passed and signed by the close of the session.

18. A third suit, filed by P. M. & M. Electric alleging it would be denied City contracts because of its refusal to comply with the Ordinance was dismissed due to lack of standing because the company had not sought a City contract. Both this suit and the one subsequently filed by Ohio-based S.D. Myers, Inc. were sponsored by the American Center forLaw and Justice, a legal group founded by anti-gay Christian Coalition leader Pat Robertson.

APPENDIX L

Neb.Rev.St. CONST Art. I, § 29

NEBRASKA REVISED STATUTES OF 1943

CONSTITUTION OF NEBRASKA

ARTICLE I. BILL OF RIGHTS

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Current through First Regular Session of the 98th Legislature (2003)

§ 29. Marriage; same-sex relationships not valid or recognized.

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Source: Neb. Const. art. I, sec. 29 (2000); Adopted 2000, Initiative Measure No. 416.

Neb.Rev.St. CONST Art. I, § 29
NE CONST Art. I, § 29
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APPENDIX M

MI SENATE JOINT RESOLUTION E
October 7, 2003

Introduced by Senators CROPSEY, GARCIA, HARDIMAN, CASSIS, BISHOP, BIRKHOLZ, PATTERSON, GILBERT, VAN WOERKOM, GOSCHKA, BROWN, SANBORN, JELINEK, STAMAS, KUIPERS, SIKKEMA, McMANUS and OLSHOVE and referred to the Committee on Government Operations.

A joint resolution proposing an amendment to the state constitution of 1963, by adding section 25 to article I, to define marriage as only between one man and one woman.

Resolved by the Senate and House of Representatives of the state of Michigan, That the following amendment to the state constitution of 1963, to define marriage as only between one man and one woman, is proposed, agreed to, and submitted to the people of the state:

ARTICLE I

Sec. 25. To secure and preserve the benefits of marriage for our society and for future generations of children, only marriage between one man and one woman shall be recognized as valid in this state.

No other relationship shall be recognized as a marriage or its legal equivalent by the state, its political subdivisions, or [page 2] educational institutions under Article VIII, regardless of whether such a relationship is recognized by the laws of any jurisdiction outside of this state.

Resolved further, That the foregoing amendment shall be submitted to the people of the state at the next general election in the manner provided by law.

(2)

No. 03-911

Supreme Court, U.S.
FILED
FEB 9 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

S.D. MYERS, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether San Francisco's Equal Benefits Ordinance is valid under Due Process and the dormant Commerce Clause where the Ordinance applies only to businesses that enter into contracts with the City, and to employees working on those contracts, and the Ordinance serves the City's legitimate interest in dissociating itself from a form of discrimination that is offensive to the local community.

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INTRODUCTION

In *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), the Ninth Circuit applied well-settled law to the facts of the case to uphold San Francisco's Equal Benefits Ordinance ("the Ordinance") under the Due Process and Commerce Clauses. The Ninth Circuit's decision is consistent with decisions of this Court and other circuit courts. Petitioner S.D. Myers, Inc. ("Myers") presents no sound basis for granting *certiorari*.

For over 30 years, Respondent City and County of San Francisco ("the City") has refused, as a matter of public policy, to do business with contractors that discriminate on the basis of sexual orientation. In 1997, the City enacted the Ordinance to "fulfill in economic terms" this promise. Petitioner's Appendix ("App.") 25a. The Ordinance is a nondiscrimination-in-contracting measure that instructs the City's departments and contracting agents to include in City contracts a provision requiring that contractors provide the same benefits to married employees and employees with domestic partners.

Myers is an Ohio-based company that bid on but was not awarded a City contract because Myers refused to certify that it would comply with the Ordinance. Myers challenged the Ordinance under the Due Process and Commerce Clauses, among other grounds. Both the district court and Ninth Circuit rejected Myers' challenge.

In its *certiorari* petition, Myers (1) manufacturers conflicts that do not exist; (2) seeks to remedy a failure of proof by citing "subsequent developments" that either predate the decision below or make no difference to the result; and (3) remakes case-specific arguments already

lost. Not only is Myers' Petition without merit, it is untimely and the company lacks standing to assert its claims.

The Court should deny *certiorari*.

STATEMENT OF FACTS

Adopted in November 1996 and made operative on June 1, 1997, the Ordinance expresses the City's decision to do business only with companies that provide equal compensation for their married employees and their employees with domestic partners. *See* S.F. Admin. Code § 12B.1, *et seq.* (App. F). The Ordinance does not require City contractors to provide any particular benefits. It mandates only that if a contractor provides benefits to its married employees, the contractor must treat its employees with domestic partners on an equal basis. San Francisco Administrative Code section 12B.1(b) states:

> No contracting agency of the City . . . shall execute or amend any contract or property contract with any contractor that discriminates in the provision of . . . benefits between employees with domestic partners and employees with spouses, . . . where the domestic partner has been registered with a governmental entity. . . .

The Ordinance is not a police power measure of general application; rather it applies only to companies that contract with the City. Geographically, the Ordinance applies "to (i) any of a contractor's operations within San Francisco; (ii) a contractor's operations on real property outside of San Francisco owned by the City or that the City has a right to occupy if the contractor's presence at

that location is connected to a contract or property contract with the City; and (iii) [other locations] where the work is being performed by a contractor for the City within the United States." S.F. Admin. Code § 12B.1(d)(i), (ii) and (iii). While the application of the first two subsections is mandatory, the application of subsection d(iii) is discretionary, depending upon prescribed factors. S.F. Human Rights Comm. Rules of Procedure, Rule IV (B)(3) (http://www.sfgov.org/site/sfhumanrights).

In September 1997, Myers was the low bidder on a contract to maintain and service City-owned electrical generators on property that the City owned outside of its boundaries in northern California. When Myers refused to certify that it would comply with the nondiscrimination provisions of the Ordinance, the City rejected its bid and entered into negotiations with the next highest bidder. Because Myers would not comply with any provision in the Ordinance, the City never had occasion to determine whether San Francisco Administrative Code section 12B.1(d)(iii) would apply the Ordinance to any of Myers' operations outside the state of California.

Myers sued the City and its Human Rights Commission. Among other things, the company alleged that the Ordinance's potential extraterritorial application violated (1) the dormant Commerce Clause, (2) the Due Process Clause, and (3) the California Constitution.

On May 27, 1999, the district court granted the City's motion for summary judgment. App. B.

On June 14, 2001, the Ninth Circuit affirmed. App. A. The court rejected Myers' claim that the Ordinance directly regulated interstate commerce in violation of the Commerce Clause because (1) the Ordinance applies only

to those companies who contract with the City, regardless of whether the companies are engaged in interstate commerce (*id.* at 7a-9a); and (2) Myers produced no evidence that the Ordinance conflicted with actual or imminent legislation in other states (*id.* at 12a). The court rejected Myers' claim that the Ordinance indirectly regulated interstate commerce in violation of the Commerce Clause because the City's legitimate interests in applying the Ordinance outweighed the limited burden on interstate commerce. *Id.* at 14a. The court rejected Myers' Due Process claim because the Ordinance's provisions did not constitute economic penalties under *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and even if they had, the Ordinance is supported by legitimate City interests. *Id.* at 15a. The court also remanded Myers' claim under the California Constitution for the district court to decide in the first instance whether a new state law preempted the Ordinance. *Id.* at 16a.

On June 24, 2002, the district court held that the new state law did not preempt the Ordinance. App. C. On July 29, 2003, the Ninth Circuit affirmed. App. D. Two months later, the Ninth Circuit denied Myers' petition for rehearing. App. E. Myers does not raise any issue of state law preemption in its Petition.

REASONS TO DENY *CERTIORARI*

I. The Court Should Deny *Certiorari* Because The Petition Is Untimely.

Where a federal Court of Appeals has ruled on all issues of federal law, remanding only state law issues that are not reviewable by this Court, a party seeking review

on the federal issues may seek *certiorari* within 90 days of the Court of Appeals' ruling on the reviewable, federal law issues. *See* 28 U.S.C. §§ 1254 (1), 2101 (c), (e). This case presented such circumstances: the Court of Appeals decided all federal questions in the case on June 14, 2001. App. A. The federal questions decided were completely severable from the pendent question of state law that the Court of Appeals simultaneously remanded to the district court: whether a newly enacted California statute pre-empted the Ordinance. *Id.* at 16a. Rather than waiting two years for the resolution of this non-reviewable question of state law, Myers could and should have sought *certiorari* on the federal questions within 90 days of June 14, 2001. In view of Myers' delay in seeking review, especially given Myers' attempt to remedy its failure of proof based on supposed "subsequent events" not before the courts below (*see* Pet. at 4-7, 21-22), this Court should exercise its discretion to deny *certiorari*.

II. The Court Should Deny *Certiorari* Because Myers Lacks Standing To Challenge The Extra-territorial Application Of The Ordinance.

To satisfy Article III's case-and-controversy requirements, Myers must show the following:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 180-81 (2000). "The party invoking

federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

In the present case, Myers' purported injury under both the Due Process and Commerce Clauses was the denial of a contract due to the City's alleged attempt to regulate Myers' conduct in Ohio. That injury, however, was illusory because of a stipulation that Myers signed. Myers stipulated that it was "unwilling to comply with *any* of the City's equal benefits requirements, even if Myers' unwillingness to comply means that Myers would consequently be ineligible for the award of a City contract." App. 91a (emphasis added). Among those requirements were two that make the Ordinance applicable to a contractor's operations (i) within the City and (ii) on real property that the City owns outside of its own boundaries.[1] Sec. 12B.1(d)(i) and (ii); Pet. App. F at 71a. In other words, Myers stipulated that it was unwilling to comply with the Ordinance even within California, where the contract was to be performed. App. 97a.[2] The City had no occasion in this case to consider the discretionary question of whether to apply the Ordinance to Myers' employees providing "administration, supervision and procurement services" in

[1] The City owns no property outside the state of California.

[2] Myers contends that it would have assigned four "Ohio-based" employees to perform the work that the contract called for (App. 97a); however, it is undisputed that while performing the contract work – which was maintenance of City-owned electrical transformers that were part of the Hetch Hetchy Water and Power system – the employees would not be in Ohio but rather would be "on-site" at the City's property located in Moccasin, California. *Id.*

support of the contract from Myers' principal office in Ohio. *See* App. 97a.

As a result of the stipulation, the injury that Myers alleges – the City's purported effort "to control its conduct beyond the boundaries of the State" – was never "actual or imminent." The Court should deny *certiorari* because Myers lacks standing to claim the injury of which it complains.[3]

III. The Court Should Deny *Certiorari* Because The Decision Below Merely Applies Settled Law And Is Consistent With The Decisions Of Other Circuits And Of This Court.

Myers seeks *certiorari* on four grounds. None has merit.

A. As To Myers' Claim Under Due Process, Myers Has Presented No Conflict Among Circuits Or Any Other Sound Basis For Granting *Certiorari*.

Myers mistakenly asserts that in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grds. sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the First Circuit applied *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996), in a

[3] Although the lower court rejected on the merits Myers' claims under the Due Process and Commerce Clauses, lack of standing and similar Article III limitations on the federal courts' jurisdiction cannot be waived and are always a basis for denying federal relief. *United States v. Hays*, 515 U.S. 737, 742 (1995).

manner that conflicts with the decision below. Pet. at 9-10. In *BMW*, this Court held that Tennessee violated Due Process by permitting a jury to impose excessive economic sanctions – punitive damages grossly disproportionate to actual damages – on an out-of-state automobile manufacturer for conduct that was lawful in the state where the automobile was manufactured. In the present case, the Court of Appeals ruled that the loss of a contract due to an out-of-state company's decision not to comply with a local government's nondiscrimination-in-contracting provisions did not constitute an "economic penalty" within the meaning of *BMW*. 253 F.3d at 472.

Natsios does not hold otherwise. There, the First Circuit invalidated Massachusetts' Burma Ordinance under the Foreign Commerce Clause. 181 F.3d at 67. In the course of its decision, the court cited *BMW* for the proposition that a state may not deprive a company of a contract based upon extraterritorial conduct that is legal in the place where the conduct occurs. *Id.* at 69.

Significantly, however, *Natsios* is not a Due Process case. The language citing *BMW*, 517 U.S. 559, was not part of, or necessary to, the holding in *Natsios*. *Dicta* creates no conflict between circuits worthy of this Court's resolution.

Further, in this case the Ninth Circuit set forth an alternative ground for rejecting reliance on *BMW*, a ground that distinguishes *Natsios*:

> Even were we to assume that the Ordinance's requirements constitute an economic penalty, narrowly construed the Ordinance only applies in the City, on City-owned property, or as to employees working on a City contract. Thus, the

> Ordinance is 'supported by the [City]'s interest in protecting its own consumers and its own economy.' [*BMW v. Gore,* 517 U.S.] at 572, 116 S.Ct. 1589. While it is possible that the City could attempt to wield extraterritorial control through broadly interpreting section 12B.1(d)(iii), on this facial challenge we will not invalidate the Ordinance unless Myers can 'establish that no set of circumstances exists under which the [Ordinance] would be valid.' *See* [*United States v.*] *Salerno*, 481 U.S. at 745, 107 S.Ct. at 2095.

253 F.3d at 472 (App. 15a).

Myers asserts that the court below erred in applying *Salerno* because Myers' challenge to the Ordinance was not merely "facial" but also "as-applied." Pet. at 9 n. 8 and 16. There are at least three problems with this assertion. First, Myers' challenge under the Due Process Clause was purely facial; only its challenge under the Commerce Clause had both facial and as-applied aspects. Second, even if some misapplication of *Salerno* occurred – which it did not – such an error would not serve as a proper basis for *certiorari*. Finally, Myers waived the contention as to both its Due Process and Commerce Clause claims. In reply to Respondent's argument in the Court of Appeals for applying *Salerno* because of the facial nature of the challenge, Myers failed to assert that it had brought an as-applied challenge. *See* Appellant's Reply Brief at 26, 3-4. Instead, Myers argued only that *Salerno* prescribed the wrong standard to apply in facial challenges. *Id.*

B. As To Myers' Claim That The Ordinance Directly Regulates Interstate Commerce In Violation Of The Commerce Clause, Myers Has Presented No Conflict Among Circuits Or Any Other Sound Basis for Granting *Certiorari*.

Myers erroneously contends that the decision below conflicts with *Natsios* on a second basis: this time, Myers asserts a conflict under the first tier of the two-tier test set forth in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986):

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. (Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).)

1. The Decision Below Does Not Conflict With *Natsios* Or This Court's Decisions Regarding Whether A Local Contracting Measure Discriminates Against Out-Of-State Commerce.

According to Myers, the decision below holds that the Ordinance does not regulate directly because it is a contracting measure, while *Natsios* holds that the Burma statute's contractual nature does not shield it from invalidation as a direct regulation of commerce. *Id.* Again,

however, the two cases are easily harmonized. In *Natsios*, the challenged statute facially discriminated against foreign commerce by barring from state contracts companies that did business with Burma. By contrast, the Ordinance is neutral on its face. As Judge Wallace stated for the unanimous court below:

> [T]he Ordinance contains no language explicitly or implicitly targeting either out-of-state entities or entities engaged in interstate commerce. Rather the Ordinance applies to all contractors with the City without any reference to the type or extent of a contractor's commercial operations.

Myers I, 253 F.3d at 468 (App. 7a). Thus, the decision below and *Natsios* are not in conflict.

Myers also asserts that the decision below is at odds with *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). Pet. at 11-13. *Wunnicke* has no bearing on this case. There, the Court considered a contracting statute that favored local economic interests by requiring buyers of Alaskan timber to have the lumber processed in-state. The Court rejected Alaska's claim that it could avoid unconstitutionality on the ground that the state was not acting as a regulator but rather as a market participant. In this case, by contrast, the Court of Appeals assumed for purposes of analysis that the City was acting as a regulator, not a market participant. *Myers I*, 253 F.3d at 467. Unlike the statute in *Wunnicke*, the Ordinance withstood scrutiny because it was neutral on its face. *Id.* at 468.

Finally, Myers wrongly contends that "in holding that the ordinance does not directly regulate interstate commerce unless it is facially invalid, the Ninth Circuit's decision is in conflict with" *American Booksellers Found. v.*

Dean, 342 F.3d 96, 104 (2nd Cir. 2003). Pet. at 17. Myers misreads *American Booksellers*. There, the court held that in enacting a statute criminalizing the distribution via the internet of sexually explicit materials "harmful to minors," Vermont had "'projected its legislation' into other States, and *directly regulated* commerce therein," a facial violation of the dormant Commerce Clause. *Id.* (emphasis in original). In this case, by contrast, the court below found no direct regulation of interstate commerce because "employers are 'subject to' the Ordinance only as to employees that have a direct contact with the City." *Myers I*, 253 F.3d at 469, *citing Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). *American Booksellers* and the decision below are fully consistent.

2. The Decision Below Conflicts With No Decision Of Other Circuits Or Of This Court Regarding The "Practical Effect" Of A Local Law On Interstate Commerce.

In *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989), the Court considered a Connecticut statute that required out-of-state shippers of beer who sold beer to wholesalers in the state to affirm that their in-state prices were no higher than the lowest prices at which they sold beer in neighboring states. The aim of the law was to protect in-state consumers, and the law did so in a manner that favored wholly in-state sellers over sellers engaged in interstate commerce. *Id.* at 341. In invalidating the statutes, the Court made clear that the critical inquiry in determining whether a statute directly regulates interstate commerce is the statute's "practical effect." Determining "practical effect" includes "considering how the challenged statute

may interact with the legitimate regulatory regimes of other States. . . . " *Id.* at 336.

Applying *Healy* and *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 448 (1960), the court below upheld the Ordinance. *Myers I*, 253 F.3d at 469-70. Myers produced no evidence that the Ordinance's interaction with any enacted or imminent law from other states created any conflict or imposed any burden on interstate commerce, much less an impermissible burden. *Id.*

Attempting after-the-fact to repair its failure of proof, Myers inappropriately asks the Court to grant *certiorari* based on out-of-state legislation that allegedly (a) arose subsequent to the lower court's decision in this case, and (b) conflicts with the Ordinance. Pet. at 14-15. As to the first legislation cited, however, Nebraska enacted Article I, section 29 of its Constitution in 2000, at least six months before the decision in *Myers I* and two years before the decision in *Myers II.* App. 171a and App. D. The Federal Rules of Appellate Procedure specifically provide a means for parties to advise the court of legal developments while a case is under submission. F.R.A.P. 28 (j). Myers' failure to bring the measure to the attention of the Court of Appeal constitutes a waiver of its right to do so. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001).

Further, even if Myers had not waived the right to raise this measure as a ground for invalidating the Ordinance, on the merits the Nebraska provision does not conflict with the Ordinance. The Nebraska provision states that civil unions, domestic partnerships, or other similar same-sex relationships shall not be valid or recognized "in Nebraska." The Ordinance does not require the State of Nebraska – or any state or local governmental

agency – to recognize same-sex relationships such as domestic partnerships. Rather, the Ordinance applies only to companies that enter into contracts with the City. A Nebraska-based company doing business with the City may readily comply with the Ordinance without violating the Nebraska provision cited by Myers.

As to the second piece of legislation cited, Myers has not shown that the adoption of Michigan Senate Resolution E is "imminent." *See Huron Portland Cement*, 362 U.S. at 448. The resolution's sponsors introduced the measure and referred it to committee in October 2003. App. 172a. Presumably, adoption would require approval by the legislature, and certainly, it requires approval by the voters of the state. *See* App. 172a. Myers has produced nothing to suggest that either of these contingencies is likely to occur, or when, at the earliest, they might occur.

Further, even if the Resolution's adoption were imminent, it would not warrant the Court's intervention in this case for several reasons.

First, the decision below remains sound as written. It presents no conflict with decisions of this Court or the lower courts.

Second, the proposed amendment, even if adopted, would not have the "practical effect" of conflicting with the Ordinance or changing the nature of the interaction between the Ordinance and Michigan law. Under the proposed constitutional amendment, Michigan would recognize only marriage between a man and a woman, and would recognize no other relationship as the legal equivalent of marriage. App. 172a. That is the current statutory rule of law in Michigan (M.C.L. §§ 551.1, 551.2, 551.271),

and the Ordinance is not to the contrary. As a local nondiscrimination-in-contracting measure, the Ordinance does not – and could not – authorize or create legal equivalence between marital and non-marital relationships. The Ordinance prescribes only that City contractors not discriminate economically in the benefits that they provide to married employees and employees with registered domestic partners.

Put another way, the proposed amendment would not forbid what the Ordinance allows: the proposed amendment would not bar Michigan employers from granting equal benefits, just as current law does not bar such benefits. And the Ordinance, as construed, requires only that Michigan companies doing business with San Francisco make equal benefits available to employees who maintain "minimum contact" with the City or its business. *Myers I*, 253 F.3d at 468-69.

Relying on *Healy* and *Brown-Forman*, Myers asserts that an interstate business's ability to comply simultaneously with inconsistent measures does not necessarily save a law challenged on the ground that its interaction with other states' laws burdens interstate commerce. Pet. at 14-15. But unlike the interaction among various states' statutes in *Healy* or *Brown-Forman*, the projected interaction in this case would not create any significant burden on commerce. The "price affirmation" statutes in *Healy* and *Brown-Forman* had the "practical effect" of forcing beer manufactures to level prices in neighboring states so that they could sell in-state. Such a deterrent to market competition was precisely what "the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. While the Ordinance may impose a slight "burden" on some contractors (both in- and out-of-state), the Ordinance will not

impose an impermissible burden on *commerce*, even in interaction with the Nebraska provision and the Michigan amendment should the latter be adopted. *Myers I*, 253 F.3d at 471, citing *C & A Carbone v. Clarkstown*, 511 U.S. 383, 390 (1994); *see also Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992) ("As we have long recognized, the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'").

C. As To Myers' Claim That The Ordinance Indirectly Regulates Interstate Commerce In Violation Of The Commerce Clause, Myers Has Presented No Conflict Among Circuits Or Any Other Sound Basis for Granting *Certiorari*.

Rather than offering any legitimate ground for *certiorari*, Myers simply argues the merits of its claim that the Ordinance fails the "*Pike* balancing" portion of the two-tier test under *Brown-Forman*. Pet. at 17-20.

First, Myers asserts that "the court [below] failed to articulate any legitimate interest of the City in the [*Pike* balancing] analysis." Pet. at 18. Myers has apparently overlooked the court's statement that "the Ordinance is supported by the [City]'s interest in protecting its own consumers and its own economy." *Myers I*, 253 F.3d at 472. The Ordinance does so by ensuring that companies working for the City provide competitive benefits for unmarried workers, thereby attracting a capable work force.

Myers then acknowledges the City's interest in preventing economic discrimination based on sexual orientation. Pet at 19. Myers proceeds to reargue its case that the Ordinance's service of this interest is "illusory." Pet. at 19-20; *see Myers I*, 253 F.3d at 471-72. This Court's time should not be taken by review of fact-specific contentions rejected by the Court of Appeals.

D. The Court Should Not Remand The Case To The Court Of Appeals For Consideration In Light Of Inconsequential, Subsequent Developments.

Last, Myers asks the Court to grant *certiorari,* vacate the decision below and remand ("GVR") for reconsideration in light of (a) Article I, section 29 of the Nebraska Constitution, (b) Michigan Joint Senate Resolution E, and (c) five years of annual reports of the City's Human Rights Commission on the implementation of the Ordinance ("HRC annual reports"). Pet. at 21. None of these "intervening developments" even remotely justifies a grant of GVR.

As to Nebraska's constitutional amendment, as discussed above, Myers has waived its claim to assert a conflict based upon the provision and, in any event, the provision does not conflict with the Ordinance. *See* p. *ante.*

As to the Michigan provision, its recent proposal is not an "intervening development" that "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . . . " *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The premise below was that to overturn the Ordinance under *Healy,* Myers had the burden of producing evidence of conflicting legislation

from other jurisdictions or at least evidence "that the threat of such legislation is both actual and imminent." *Myers I*, 253 F.3d at 269-270, citing *Huron Portland Cement*, 362 U.S. at 448. As discussed above, Myers has not shown that the adoption of the Michigan amendment is imminent. *See* p. *ante*.

Further, even if such adoption were imminent, there is no "reasonable probability" that a re-determination based upon the proposed amendment would affect the result. *See Chater,* 516 U.S. at 167. As discussed above, the amendment, if adopted, would not significantly change anything about the Ordinance's practical effect on interstate commerce. *See* p. *ante*.

Finally, as to the HRC annual reports, the first three were published on the City's website by August 2000, three months before the parties argued the case in the Court of Appeals and nearly a year before the court decided it. Pet. at 5-7. Such public documents are not "subsequent" developments, and Myers' failure to raise them below means it has waived any right to rely on them.

As to the fourth and fifth annual reports, Myers quotes post-ruling

(1) statistics on the number of City contractors nationwide that offer equal benefits;

(2) statistics on the number of workers nationwide who have benefited;

(3) statements expressing pride in the number of workers who have benefited from the Ordinance;

(4) statements expressing the City's policy of trying to persuade contractors to extend

equal benefits beyond what the City can require; and

(5) statistics on the number of City contractors that have voluntarily extended benefits beyond what the Ordinance requires.

Pet. at 6, 10, 19. These are the same kinds of statistics and statements included in the three pre-ruling HRC annual reports. There is nothing outcome-determinative – or reasonably likely to be outcome-determinative – about any of them. Myers has presented no basis for the Court to take the extraordinary step of reopening a case properly decided more than two years before Myers sought *certiorari*.

CONCLUSION

The Court should deny the writ.

DATED: February 9, 2004

Respectfully submitted,

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No. 03-911

IN THE

Supreme Court of the United States

S.D. MYERS, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents' Opposition to S.D. Myers, Inc.'s Petition for Certiorari *nowhere denies the interstate impact of the ordinance at bar* on employers throughout the country. Instead, the City and County of San Francisco and the San Francisco Human Rights Commission's (the "City") Opposition attempts to sidestep the issue by asserting that (a) S.D. Myers has waived its right to use public admissions of the interstate impact of the ordinance that were not produced in discovery and were not disclosed publicly until long after the close of discovery; (b) S.D. Myers waived claims or has no standing to assert them; (c) there can be no conflict between cases addressing facial versus as-applied violations of the dormant commerce clause; and (d) S.D. Myers' Petition was untimely because S.D. Myers waited to seek review until its state-law claims were adjudicated. Significantly, the City does not address the conflict between the Ninth Circuit and *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982), which held that a "State has no legitimate interest in protecting nonresident[s]."

The Opposition fails to counter the compelling reasons for this Court to grant a writ of certiorari. S.D. Myers files this Reply only to address points raised in the Opposition that may not have been fully addressed in the Petition.

I. S.D. MYERS HAS STANDING

S.D. Myers' injury occurred on November 24, 1997, when the City refused to award it a contract, even though S.D. Myers' had submitted the lowest bid. However, the City argues that the injury was illusory because of an affidavit signed a year later. (Opposition at 6.) The idea that events that occur after-the-fact can make a pre-existing injury "illusory" is a novel view of an "injury in fact."

The sole reason for the City's refusal to award the contract was that S.D. Myers did not sign an affidavit that it was in compliance with Chapter 12B of the City's Administrative Code (the "ordinance"). At that time, the ordinance applied on its face to "(iii) a contractor's work in other places outside the City within the United States where work related to a City contract is being performed, and (iv) any of a contractor's operations elsewhere in the United States." Chapter 12B.1(d), App. 72a. Accordingly, for S.D. Myers to have obtained the contract, it would have had to agree to provide domestic partner benefits for all of its employees.

The City now argues that it never had occasion to consider whether S.D. Myers would have had to provide domestic partner benefits to anyone other than the four Ohio-based employees who would have worked on the contract in California. (Opposition at 6.) However, the City's position in the district court was that it had the right to enforce the ordinance at any of a contractor's operations in the United States. App. 38a-39a. That is the context in which S.D. Myers affirmed in 1998 that it was unwilling to comply with the ordinance. If the City had been willing to allow S.D. Myers to comply with the ordinance only in regard to employees that S.D. Myers sent to California, S.D. Myers could easily have complied with the ordinance by sending only married employees. The City was unwilling to permit that option in 1997, and its effort to imply otherwise in its Opposition is less than forthright.

II. S.D. MYERS MAY RELY UPON THE CITY'S SUBSEQUENTLY-PUBLISHED ADMISSIONS OF EXTRATERRITORIAL IMPACT OF THE ORDINANCE

The City baldly asserts that S.D. Myers waived the right to rely on the San Francisco Human Rights Commission

("SFHRC") annual reports by failing to raise them below. It cites to pages 5-7 of the Petition for the proposition that the first three reports were on the "City's website by August 2000, three months before the parties argued the case in the Court of Appeals and nearly a year before the court decided it." (Opposition at 18.) Notwithstanding the citation to the Petition for that proposition, what the Petition asserted, based on trial counsel's familiarity with the City's website, was that the reports were posted to the website "subsequent to the Ninth Circuit's decision." Petition at 5. Even if the first three reports had been published on the City's website in August 2000, that was long after the close of discovery and more than a year after entry of summary judgment. In any event, counsel for the City clearly violated the duty under Fed. R. Civ. P. 26(a)(1) to voluntarily disclose the first reports as relevant evidence of the extraterritorial application of the ordinance, as alleged in the trial court. App. 23a. If this evidence that came to light after the Ninth Circuit's decision had been presented to the trial court or the court of appeals, the outcome would surely have been different. Under the circumstances, the City's assertion of waiver is not well grounded.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. Due Process

The City asserts a novel theory of waiver in asserting that S.D. Myers has waived its as-applied due process claim by failing to re-argue it in its reply brief. (Opposition at 9.) S.D. Myers argued both in the trial court and in its opening brief on appeal that the ordinance as applied violated its due process rights. (See Petition at 9, n.8.) The purpose of a reply brief is not to rehash the opening brief, but to respond to arguments

raised by the appellee. *Network LLC v. Centraal Corp.*, 242 F.3d 1347, 1356 (Fed. Cir. 2001) (citing Michael E. Tigar & Jane B. Tigar, *Federal Appeals Jurisdiction and Practice* 469-70 (3d ed. 1999)). Unsurprisingly, the City cites no authority for its claim that failing to rehash an argument in a Reply brief is a waiver.

Despite the City's efforts to minimize the Ninth Circuit's misapplication of *BMW v. Gore*, 517 U.S. 559 (1996), the fact remains that the court's decision is inconsistent with *BMW* and the First Circuit's application of it in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1999), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). (Petition at 8-10.) Moreover, the First Circuit's reliance on *BMW* was not mere *dicta*–the court clearly viewed the statute at issue as imposing economic sanctions on contractors that did not comply with the Massachusetts law.[1] *Id.* Using a City ordinance to penalize or control legal conduct in other states violates due process. *BMW*, 517 U.S. at 572; *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

B. Interstate Commerce Clause

The City attempts to harmonize the Ninth Circuit's decision with *Natsios* by arguing that the Massachusetts statute was facially discriminatory, while the ordinance is facially neutral. (Opposition at 10-11.) But the portion of the *Natsios* opinion that is in conflict with the Ninth Circuit is the discussion of the statute as applied–the actual regulation of conduct beyond Massachusetts' borders through the practical effect of the

[1]The First Circuit's citation of *BMW* in a discussion of the dormant Commerce Clause simply reflects the overlap between concepts often discussed in both due process and dormant Commerce Clause cases. *See, e.g., BMW*, 517 U.S. at 571-573 (citing Commerce Clause cases); *Edgar*, 457 U.S. at 643 (citing *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

statute. *Natsios*, 181 F.3d at 69-71. That conflict is direct. (Petition at 10-11.)

The City asserts that *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984), has no bearing on this case because the Ninth Circuit assumed that the City was acting as a market regulator. (Opposition at 11.) However, the crux of the *Wunnicke* decision was that Alaska was acting as a market regulator rather than a market participant as well. The Ninth Circuit ruled that the City may impose conditions without being a market participant, while *Wunnicke* held that "[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *Wunnicke*, 467 U.S. at 97. With respect to S.D. Myers, the ordinance imposes conditions far beyond the particular market of electrical transformer maintenance. Thus, *Wunnicke* is directly on point, and the Ninth Circuit's decision is inconsistent with it.

The City misrepresents the holding of *American Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2003), by arguing that the statute at issue there was facially invalid. (Opposition at 12.) In reality, the First Circuit held that "[a]lthough [the statute] *does not discriminate against interstate commerce on its face*, we agree with the district court that it presents a *per se* violation of the dormant Commerce Clause." *Id.* (emphasis added). The City makes the same mistake that the Ninth Circuit did when it assumed that an ordinance cannot be a *per se* violation of the commerce clause unless the statute is facially invalid. *See S.D. Myers v. City and County of San Francisco*, 253 F.3d 461, 466-67, 471 (2001). That is the clear conflict between *S.D. Myers* and *American Booksellers*.

The City reveals a myopic view of the case law dealing with the practical effect of state laws on interstate commerce. According to the City–and the Ninth Circuit–a statute does not have the practical effect of regulating interstate commerce unless it is inconsistent with the laws of other states. (Opposition at 12-13.) While determining the practical effect undoubtedly *includes* evaluating how a provision interacts with the laws of other states, the evaluation is not *limited* to interaction with other laws. Rather, as the First Circuit held in *American Booksellers*, a statute has the "practical effect" of directly regulating interstate commerce when a state (or a city) "'has "projected its legislation" into other States, and *directly regulated* commerce therein' . . . ." *American Booksellers*, 342 F.3d at 104 (quoting *Brown-Forman Distillers Corp. v. New York St. Liquor Auth.*, 476 U.S. 573, 584 (1986) (emphasis added by court). Accordingly, the City is simply wrong in asserting that *S.D. Myers* is not in conflict with any other decisions. (Opposition at 12.)

The City makes a strained waiver argument in an effort to persuade the Court not to consider the conflict between the ordinance and the Nebraska constitutional amendment or other pending constitutional amendments. The City cites *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001), which stands for the unremarkable proposition that arguments not raised or briefed below are waived. (Opposition at 13.) But *TRW* does not address events that occurred subsequent to briefing and oral argument below. In addition, Fed. R. App. P. 28(j), upon which the City also relies, refers to Supplemental Authorities, and explicitly prohibits any argument with a Rule 28(j) submission. Thus, S.D. Myers would have had no opportunity in a Rule 28(j) submission to explain that the possibility of complying with two laws does not mean there is no conflict between them. (See Petition at 14-16.) Moreover, the ordinance has a direct and substantial impact on interstate

commerce independent of its conflict with other laws. (See Petition at 6-7, 14-16.)

Finally, it is a misrepresentation of Michigan law to assert, as the City does, that the proposed constitutional amendment, App. 172a, represents "the current statutory rule of law in Michigan." (Opposition at 14.) The statutes the City cites define marriage as the union of a man and a woman, but they do not prohibit recognition of any other relationship "as a marriage or its legal equivalent." It is the latter provision of the constitutional amendment that, when adopted, will give Michigan employers a constitutional right that San Francisco attempts to take away by its ordinance.

IV. S.D. MYERS' PETITION WAS TIMELY

Respondents advance another quasi-waiver theory when they argue that this Court should deny review because S.D. Myers could have sought review in 2001. (Opposition at 4-5.) If it had done so, of course, the City would have argued that the Petition was premature. Unsurprisingly, Respondents cite no authority for the proposition that a party *should* seek certiorari prior to final judgment. Indeed, this Court does not ordinarily grant review of interlocutory decisions, even though it may. *See Randolph Central School Dist. v. Aldrich*, 506 U.S. 965 (1992); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 258 (8th ed. 2002). S.D. Myers' Petition was timely, and the permissibility of seeking review before final judgment should not affect the Court's decision.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Court should grant the Petition for Certiorari.

Respectfully Submitted,

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